No. 05-

IN THE

Supreme Court of the United States

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE McNAMARA ELEMENTARY SCHOOL, ROBERT CREME, individually, and in his official capacity as principal of CATHERINE McNAMARA ELEMENTARY SCHOOL, and THEODORE GILKEY, individually, and in his official capacity as Superintendent for Baldwinsville School Board of Education,

Petitioners,

v.

ANTONIO PECK, a minor by and through his parents and next friends, JOANNE PECK and KENLEY LESTER PECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly interpreted this Court's decision in *Hazelwood School District v. Kuhlmeier* – in accord with the Eleventh Circuit but in conflict with the First and Tenth Circuits and at least one panel of the Ninth Circuit – to hold that it is, prima facie, unconstitutional under the Free Speech Clause of the First Amendment for public school educators to place viewpoint-based restrictions on school-sponsored speech, *even if* those restrictions are reasonably related to legitimate pedagogical concerns.

2. Whether the Second Circuit correctly held that a public school kindergarten student may have a right under the Free Speech Clause of the First Amendment to display a picture of Jesus Christ on the wall of a school cafeteria during a kindergarten environmental assembly, even though the Second Circuit found that the child's picture of Jesus was nonresponsive to the assignment his teacher had given her students to create posters for the assembly showing what they had learned in class about conserving natural resources and keeping the environment clean.

PARTIES TO THE PROCEEDINGS

Petitioners Baldwinsville Central School District, Catherine McNamara Elementary School, Robert Creme, the former principal of Catherine McNamara Elementary School, and Theodore Gilkey, the former superintendent for Baldwinsville Central School District, were the defendants and appellees below.

Respondents Antonio Peck, a minor, and his parents, Jo Anne Peck and Kenley Lester Peck, were the plaintiffs and appellants below.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cited Authorities

Page

Cited Authorities

FEDERAL STATUTES

RULES

TABLE OF APPENDICES

Baldwinsville Central School District, Catherine McNamara Elementary School, Robert Creme and Theodore Gilkey (collectively, the "School District") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit reversing the district court's judgment is reported at 426 F.3d 617 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the district court granting the School District's motion for summary judgment is unreported and is reprinted at App. 37a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 18, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech."[1]

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1. The First Amendment has, of course, been applied to state governments through the Fourteenth Amendment, *see, e.g., Cantwell v. Conn.*, 310 U.S. 296, 303 (1940), and plaintiffs seek redress pursuant to 42 U.S.C. § 1983.

INTRODUCTION

At stake here is the authority of public school teachers to conduct curricular activities so that our children "learn whatever lessons the activity is designed to teach." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The decision below effectively robs teachers of that authority, in the name of students' right to "free speech." Remarkably, we have come to this moment in a lawsuit over a kindergartner's homework.

Six years of litigation, two district court opinions and two appeals to the Second Circuit have come to pass because one afternoon Antonio Peck's kindergarten teacher gave her class a homework assignment and Antonio – or perhaps more accurately, his mother[2] – chose to do something else. Antonio's teacher told her class to make posters showing what she had taught them about picking up trash, turning off faucets, and keeping the environment clean. The posters were to be displayed at the kindergarten's environmental assembly in the school cafeteria, to which parents were invited to see what their children had learned.

In response to the assignment, Antonio submitted a poster which he made with his mother, and which consisted entirely of religious pictures and messages, including a picture of Jesus Christ kneeling in prayer, and the handwritten message "The Only Way to Save Our World." App. 74a. The poster was not responsive to the assignment, and Antonio's teacher asked him to make a new one. He did so, again with his

2. The Second Circuit concluded that school officials "made a reasonable determination that Jo Anne Peck (and not Antonio) was responsible for the poster's content." App. 25a.

mother's help. Antonio's second poster contained pictures of people picking up trash, recycling, and holding hands around the earth. But on the left side of the poster was the same picture of Jesus that had been the focus of Antonio's first poster. App. 75a. The School District displayed Antonio's second poster at the kindergarten environmental assembly, but it was folded so that the picture of Jesus was not visible. App. 76a.

The Second Circuit found that the picture of Jesus was not responsive to the poster assignment Antonio's teacher had given, and that the School District's conduct was not motivated by hostility toward religion. App. 21a, 35a. Nonetheless, the Second Circuit, evidencing its clear misunderstanding of this Court's decision in *Hazelwood*, vacated the district court's dismissal of Antonio's free speech claim, and remanded that claim for trial, to determine if the School District restricted Antonio's "speech" based on his "viewpoint," and, if so, whether the School District could justify its actions with a "compelling state interest." App. 23a-33a.

In *Hazelwood*, this Court recognized that the authority to conduct curricular activities properly rests with teachers, not students, and accordingly held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. But in its decision below, the Second Circuit found an exception that swallows the rule: any viewpoint-based restriction on school-sponsored speech "is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." App. 31a.

The Second Circuit acknowledged that its holding was controversial. "As the varying approaches of other courts suggest, the proper answer to the question of whether *Hazelwood* contemplates 'reasonable' viewpoint discrimination by school administrators in the context of school-sponsored speech is anything but clear," App. 29a-30a, and "has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions." App. 28a-29a. Indeed, the circuit split could not be more profound. Like the Second Circuit, the Eleventh Circuit has found that *Hazelwood* requires viewpoint neutrality. *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 330 (2005). The First and Tenth Circuits, however, have held that *Hazelwood* does not require viewpoint neutrality. *Ward v. Hickey*, 996 F.3d 448, 454 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). The Ninth Circuit issued an en banc decision holding that *Hazelwood* requires viewpoint neutrality, but a subsequent panel of that court held that *Hazelwood* does not require viewpoint neutrality. *Compare Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 819, 829 (9th Cir. 1991) (en banc) *with Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003). Meanwhile, the Third Circuit sitting en banc was "equally divided" on the question. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 200 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

The Second Circuit also acknowledged that its decision contradicted much of what this Court seemed to say in *Hazelwood*. "[M]uch of *Hazelwood*'s discussion of the proper role of school officials in making curricular judgments seems to suggest that viewpoint-based judgments would be

permissible, and perhaps even desirable, at least under some circumstances." App. 30a. But finding "viewpoint neutrality" to be a "core facet of First Amendment protection" outside of the curricular context, the Second Circuit refused to "depart" from requiring public school educators to make viewpoint-neutral judgments about school-sponsored speech "without clear direction from the Supreme Court." App. 31a.

In so holding, the Second Circuit rejected the better reasoned view and perilously tied the hands of public school educators within its jurisdiction. As the Tenth Circuit has forcefully explained, "[n]o doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint." *Fleming*, 298 F.3d at 928. Moreover, "[s]chools . . . routinely require students to express a viewpoint that is not their own in order to teach the students to think critically." *Axson-Flynn*, 356 F.3d at 1290. Requiring viewpoint-neutrality "would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day." *Id.* at 1292.

This Court should grant certiorari to settle the conflict among the circuits, and to restore to public school educators nationwide the authority that was rightfully preserved for them in *Hazelwood* to "assure that [students] learn whatever lessons the [curricular] activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school," 484 U.S. at 271, all of which requires that educators be permitted to make reasonable viewpoint-based judgments about school-sponsored speech.

STATEMENT OF THE CASE

The Kindergarten Environmental Study Unit

In June 1999, Antonio Peck was a student in Susan Weichert's kindergarten class at McNamara Elementary School in Baldwinsville, New York. Ms. Weichert's kindergarten curriculum included a two-month environmental study unit. App. 3a. As Ms. Weichert attested, her classroom lessons "focused on simple ways to save the environment, such as preserving trees and animals, using water and other natural resources sparingly and wisely, and keeping the environment clean." App. 3a. The study unit did *not* explore religion as an avenue for saving the world. Plaintiff Jo Anne Peck, Antonio's mother, accurately described the scope of the study unit at her deposition:

> Q. And what were they learning about to your understanding?
>
> A. Recycling, pollution, cleaning up, you know, just the basic stuff of keeping the environment clean.
>
> Q. Keeping the physical environment clean, correct?
>
> A. Right.
>
> Q. To your knowledge, did Antonio's kindergarten instruction at school include any lessons on spiritual salvation?
>
> A. No, not to my knowledge.

Q. To your knowledge, did Antonio's instruction during kindergarten at school include any lessons on Christianity or Christian prayer?

A. Not to my knowledge.

The Poster Assignment

At the end of the environmental study unit, Ms. Weichert gave her kindergartners a homework assignment. She instructed them to create a poster showing what they had learned about the environment. App. 3a. The Second Circuit found that the poster assignment was a "class assignment . . . given under highly specific parameters . . . to reflect what had been taught in the kindergarten environmental unit." App. 21a.

The posters were to be displayed at an environmental assembly put on by the kindergartners in the school cafeteria. App. 4a. The assembly, to which the children's parents were invited, "consisted of students planting a tree and singing environmentally-themed songs." App 4a. As the Second Circuit noted, this was a "school-sponsored assembly" that was "part of the kindergarten curriculum." App. 22a.

Antonio's First Poster

A copy of the first poster Antonio submitted in response to Ms. Weichert's assignment is reproduced here at App. 74a. The poster consisted entirely of religious imagery and messages, including pictures of Jesus and the Ten Commandments, and was titled "The Only Way to Save Our World." App. 6a. Ms. Weichert, after consulting with the school principal, defendant Robert Creme, asked Antonio to

prepare a second poster. App. 6a. The Pecks do not assert any claim based on the School District's reaction to Antonio's first poster. App. 7a n.2.

Antonio's Second Poster

A copy of the second poster Antonio submitted in response to Ms. Weichert's assignment is reproduced here at App. 75a. The Pecks' free speech claim is based on the School District's treatment of this poster.

At the center of Antonio's second poster was a picture of a church with crosses in its windows and on its steeple. Two stick figures placing litter into trash cans were drawn on the church. To the right of the church was a picture of a man and a woman dropping litter into a recycling bin, and a picture of children holding hands around the earth. To the left of the church was a copy of the same picture of Jesus kneeling in prayer that had been pasted onto Antonio's first poster. Both posters were made from materials provided exclusively by Antonio's mother. App. 6a-7a.

Upon reviewing Antonio's second poster, Ms. Weichert determined that the right two-thirds of the poster were responsive to her assignment. App. 7a. However, the picture of Jesus was still plainly nonresponsive. As Ms. Weichert testified at her deposition,

> [i]f God is going to save the environment, that isn't something that we discussed in the classroom. . . . [A] religious overtone to the saving of the earth . . . was not taught in the curriculum in kindergarten. Therefore, I would not

> have accepted it because it was not taught in what the children could do to help the earth.

App. 11a-12a. Ms. Weichert was also concerned that displaying the image of Jesus at the kindergarten assembly might have been misconstrued as an endorsement of the religious message it conveyed. App. 12a. Additionally, she and Principal Creme were concerned that the portion of the second poster reflecting the kneeling Jesus figure was not Antonio's work. As Principal Creme testified, the picture of Jesus was "an exact replication of something . . . that we had every reason to believe Antonio was not responsible for." App. 10a. Indeed, when Ms. Weichert asked Antonio to explain his second poster, Antonio spoke only about the figures throwing trash away – he made no mention of the kneeling Jesus figure, and made no reference to God or religion in his explanation. App. 8a. The Second Circuit found that Principal Creme and Ms. Weichert "made a reasonable determination that Jo Anne Peck (and not Antonio) was responsible for the poster's content." App. 25a.

Principal Creme and Ms. Weichert decided to display the poster at the environmental assembly folded so that the image of Jesus kneeling in prayer (*i.e.*, the left third of the poster) was not visible. App. 8a. Due to a mistake made by a parent volunteer, a greater portion of the poster than Creme and Weichert had intended was concealed; essentially, the poster was folded in half, but part of the church and two of its crosses were still visible. App. 8a, 76a.

The Pecks File Suit

Following the assembly, the Pecks sued the School District for monetary, declaratory and injunctive relief under 42 U.S.C. § 1983. The complaint alleged that school officials acted in violation of Antonio's rights to free speech and free exercise of religion under the First Amendment, and denied him equal protection guaranteed by the Fourteenth Amendment, all because they declined to display his picture of Jesus at their kindergarten environmental assembly.

The School District made a pre-answer motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court converted that motion to one for summary judgment, determined the School District was entitled to judgment as a matter of law, and dismissed the complaint. *Peck v. Baldwinsville Central School District*, 2000 U.S. Dist. 13362 (N.D.N.Y. Feb. 15, 2000). The Pecks appealed. The Second Circuit held that the district court had failed to properly notify the Pecks of its intention to convert the Rule 12(b)(6) motion into one for summary judgment, and remanded the case for discovery. *Peck v. Baldwinsville Cent. Sch. Dist.*, 7 Fed. Appx. 74, 2001 U.S. App. LEXIS 5281 (2d Cir. March 28, 2001). In particular, the Second Circuit found that discovery was potentially relevant because it might uncover evidence: (a) that the School District's conduct was motivated by animus or hostility toward Christianity or toward religion generally, and (b) that Antonio's religious message was, in fact, responsive to Ms. Weichert's assignment, as the Pecks claimed. App. 12a.

Following remand, the Pecks' attorneys conducted extensive discovery, including interrogatories, document demands, and depositions of Ms. Weichert, Sandra Jones,

the school's other kindergarten teacher, Principal Creme and Superintendent Gilkey. The Pecks' attorneys also compelled the School District to disclose the names of parents of other children in Antonio's kindergarten class, so that their private investigator could interview those parents for their account of the kindergarten environmental assembly.

When the Pecks' attorneys finally exhausted the discovery process, the School District moved for summary judgment. The Pecks abandoned their free exercise and equal protection claims, and the district court granted the School District summary judgment on the Pecks' free speech and Establishment Clause claims. The district court found, *inter alia*, that discovery had uncovered no evidence that school officials acted with animus or hostility toward Christianity or toward religion generally. App. 69a. "Indeed," the district court noted, "by leaving visible the children picking up trash in front of the church, Mrs. Weichert and Principal Creme accepted those religious references which were related to the environmental material covered in class." App. 63a. The district court also found that Ms. Weichert's conclusion that the picture of Jesus was not responsive to the assignment "was reasonable and well within her authority and discretion as a teacher." App. 59a. Once again, the Pecks appealed to the Second Circuit.

The Second Circuit's Decision Below

The Second Circuit agreed with the district court that there was no evidence to suggest the School District acted with animus or hostility toward Christianity or toward religion generally:

> We see nothing in the record to suggest that The District acted, as the Pecks contend, with the

> purpose of inhibiting religion. . . . The partial censorship of Antonio's poster, resulting in the concealment of the robed figure but the display of a church with a cross, strongly cuts against the Pecks' bare allegation that The District's actions were intended to demonstrate hostility toward religion. In short, no triable issue exists on this score.

App. 34a-35a.

Similarly, the Second Circuit, like the district court, found no evidence to suggest that Antonio's picture of Jesus was responsive to Ms. Weichert's assignment; it plainly was not. As the Second Circuit found, the undisputed record facts established that Ms. Weichert's assignment "was given under highly specific parameters . . . to reflect what had been taught in the kindergarten environmental unit." App. 21a.

The Second Circuit affirmed the dismissal of the Pecks' Establishment Clause claim. App. 33a-36a. Their free speech claim, however, received surprisingly different treatment.

First, the Second Circuit found that *Hazelwood*'s "reasonable relation to legitimate pedagogical concerns" test applied to the Pecks' free speech claim, because the poster assignment and the environmental assembly at which the posters were displayed "were indisputably 'part of the school curriculum . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.'" App. 22a (quoting *Hazelwood*, 484 U.S. at 271).

Next, the Second Circuit determined that the pedagogical concerns the School District articulated were deserving of deference under *Hazelwood*:

> Unquestionably, whether a student's work is responsive to an assignment, whether the student is responsible for the work he or she has turned in, and whether the display of a school-sponsored, religious student speech might be perceived as promoting or instructing religious perspectives are interests that are part and parcel of a school's responsibility to ensure that "participants learn whatever lessons the activity is designed to teach" and that "the views of the individual speaker are not erroneously attributed to the school." *See Hazelwood*, 484 U.S. at 271.

App. 24a n.8. The Second Circuit's analysis should have ended there, with an affirmance of the district court's dismissal of the Pecks' free speech claim.

However, the Second Circuit found there to be a question of fact as to whether the School District's enforcement of its legitimate pedagogical interests "was carried out in a non-viewpoint neutral manner," App. 24a, and concluded that this "fact question of viewpoint discrimination" required remand of the Pecks' free speech claim for trial. App. 23a-28a. If a finder of fact were to determine that Antonio's picture of Jesus "offered a 'religious viewpoint,'" App. 27a, and that the School District engaged in "viewpoint discrimination," App. 28a, then, according to the Second Circuit, the School District's decision not to display Antonio's picture of Jesus at its kindergarten environmental assembly will have violated Antonio's right to free speech, unless the School District can

prove that its actions were required by some "compelling state interest." App. 33a.[3]

The Second Circuit's decision was *not* based on a finding that the School District's actions may have been motivated by hostility toward religion; as noted above, the Second Circuit expressly determined that "no triable issue exists on this score." App. 35a. The Second Circuit's decision was premised on its holding that viewpoint-based restrictions on school-sponsored speech are "prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests," App. 31a, and its conclusion that the School District may be found at trial to have violated that newly-minted viewpoint-neutrality standard, even though Antonio's picture of Jesus was nonresponsive to Ms. Weichert's poster assignment.

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3. The Second Circuit left it to the district court to determine in the first instance just what a "compelling state interest" might be under these circumstances. App. 33a. However, the Second Circuit's opinion could be read to suggest that the School District will have to show that its actions were either necessary to avoid an Establishment Clause violation, or to "protect the children in the school." App. 33a & n.11.

REASONS FOR GRANTING THE WRIT

This Court has never expressly addressed the free speech rights of elementary school students.[4] However, in this case brought by one of the youngest of students – a kindergartner – the Second Circuit has severely eroded the necessary and rightful authority of public school educators to control curricular activities and "assure that [students] learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271.

By holding that viewpoint-based restrictions on school-sponsored speech are, prima facie, unconstitutional, *even if*

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4. *Cf. Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (concerning high school and junior high school students); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (concerning a high school student); *Hazelwood*, *supra* (concerning high school students); *see also Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) ("The Supreme Court has not expressly considered whether the free expression rights first announced in *Tinker* extend to grade school children. *Tinker* and its progeny dealt principally with older students for whom adulthood and full citizenship were fast approaching."), *cert. denied*, 520 U.S. 1156 (1997); *id.* at 1539 ("Especially considering the important role age plays in student speech cases . . . it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students. But . . . the Supreme Court has not directly decided this question.").

reasonably related to legitimate pedagogical concerns, App 31a, the Second Circuit added to a growing discord among the circuits. The First, Third, Ninth, Tenth and Eleventh Circuits have also attempted to determine whether *Hazelwood* permits viewpoint-based restrictions on school-sponsored speech, with widely divergent results. This Court should grant certiorari to resolve the conflict among the circuits. *See* S. Ct. Rule 10(a); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals").

Certiorari is also warranted because the Second Circuit's decision cannot be harmonized with this Court's *Hazelwood* decision. *See* S. Ct. Rule 10(c). *Hazelwood* plainly recognized that school officials can, and routinely must, make viewpoint-based decisions about school-sponsored speech. Contrary lower court decisions like the one below command public school educators to labor under an unworkable standard that is not required by the Constitution, robs teachers of the appropriate and necessary control of their classrooms, diminishes the ability of schools to determine their curricula, and will likely increase the number of frivolous lawsuits brought against our already overburdened and cash-strapped public schools.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS OVER THE QUESTION WHETHER VIEWPOINT-BASED RESTRICTIONS ON SCHOOL-SPONSORED SPEECH ARE, PRIMA FACIE, UNCONSTITUTIONAL, EVEN IF REASONABLY RELATED TO LEGITIMATE PEDAGOGICAL CONCERNS.

Like the Second Circuit below, the Eleventh Circuit has held that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral," even when the speech is school-sponsored speech that occurs in the context of a curricular activity. *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) ("we do not believe [*Hazelwood*] offers any justification for allowing educators to discriminate based on viewpoint" in curricular programs); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004) ("*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint."), *cert. denied*, 126 S. Ct. 330 (2005).

The First and Tenth Circuits have reached the opposite conclusion. *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (holding that *Hazelwood* does "not require that school regulation of school sponsored speech be viewpoint neutral"); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) ("[W]e conclude that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech."), *cert. denied*, 537 U.S. 1110 (2003); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290-92 (10th Cir. 2004) (same). As the Tenth Circuit explained in *Fleming*:

> If *Hazelwood* required viewpoint neutrality, then it would essentially provide the same analysis as under

> a traditional nonpublic forum case: the restriction must be reasonable in light of its purpose (a legitimate pedagogical concern) and must be viewpoint neutral. . . . In light of the Court's emphasis on the "special characteristics of the school environment," *Hazelwood*, 484 U.S. at 266, 108 S. Ct. 562 . . . and the deference to be accorded to school administrators about pedagogical interests, it would make no sense to assume that *Hazelwood* did nothing more than simply repeat the traditional nonpublic forum analysis in school cases.

298 F.3d at 926.

The Ninth Circuit's jurisprudence is mixed. In *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 819, 829 (9th Cir. 1991) (en banc), a case which that court, sitting en banc, described as "a *Hazelwood* case," the Ninth Circuit reviewed a school district's exclusion of certain advertisements from school-sponsored publications for viewpoint neutrality. *See also Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000) ("Despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit."), *cert. denied*, 532 U.S. 994 (2001). However, a subsequent Ninth Circuit panel concluded that *Hazelwood* permits viewpoint-based restrictions on student expression in the curricular context, without distinguishing the circuit's earlier en banc decision in *Planned Parenthood*. *Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003). The curricular

speech at issue in *Brown* was a graduate student's master's thesis. After concluding that *Hazelwood* applied to curricular speech at the university level, the *Brown* court ruled that *Hazelwood* permits viewpoint-based restrictions in the curricular context:

> *Hazelwood* . . . establish[es] that – consistent with the First Amendment – a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose. For example, a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write "opinions" showing how Justices Ginsberg and Scalia would analyze a particular Fourth Amendment question. . . . Such requirements are part of the teacher's curricular mission to encourage critical thinking. . . .

Brown, 308 F.3d at 953.

At the Third Circuit, a panel applied *Hazelwood* to hold that "a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible," but on rehearing en banc the circuit was "equally divided" on the question. *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc* 226 F.3d 198, 200 (3d Cir. 2000), *cert. denied*, 533 U.S. 715 (2001).

In *dicta*, the Seventh Circuit has suggested that viewpoint-based restrictions may be permitted in the public school setting. *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1542 (7th Cir. 1996) ("What the courts have not

permitted is suppression of a particular viewpoint. Yet even that restriction is not hard and fast with public schools, especially elementary schools." (citation omitted)), *cert. denied*, 520 U.S. 1156 (1997). However, each judge on the *Muller* panel wrote separately, illustrating the general uncertainty that pervades the current state of the law concerning the free speech rights of public school students.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HAZELWOOD*.

Hazelwood clearly signaled that restrictions on school-sponsored speech reasonably related to legitimate pedagogical concerns need not be viewpoint neutral. How else, for instance, could educators restrict school-sponsored student expression to assure "that the *views* of the individual speaker are not erroneously attributed to the school," something *Hazelwood* expressly permits them to do? 484 U.S. at 271 (emphasis added). As this Court noted in *Hazelwood*, "[a] school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'" *Id.* at 272 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)). Surely that does not mean a school must also refuse to sponsor speech counseling *against* drug use and irresponsible sex, so as to maintain its viewpoint neutrality. The Tenth Circuit correctly observed that the "specific reasons" this Court stated in *Hazelwood* for "supporting greater control over school sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with which messages a school chooses to associate itself, often will turn on viewpoint-based

judgments," and that "*Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint." *Fleming*, 298 F.3d at 928.

In its decision below, the Second Circuit acknowledged that "much of *Hazelwood*'s discussion of the proper role of school officials in making curricular judgments seems to suggest that viewpoint-based judgments would be permissible, and perhaps even desirable, at least under some circumstances." App. 30a. But the Second Circuit could not reconcile that aspect of *Hazelwood* with other decisions of this Court requiring viewpoint neutrality in the regulation of private speech, and thus refused to permit viewpoint-based restrictions on school-sponsored speech without more "clear direction" from this Court. App. 31a.

The fundamental flaw in the Second Circuit's analysis was its equation of "school-sponsored speech" with the private speech at issue in those cases where this Court has required viewpoint-neutrality. Those cases are inapplicable, because school-sponsored speech is *not* private speech. "School-sponsored speech," as this Court explained in *Hazelwood*, encompasses those expressive activities (like kindergarten assemblies) that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." 484 U.S. at 271.

Viewpoint neutrality is not required where the government itself speaks, or enlists private speakers to transmit its message. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833 (1995). Such is the case with school-sponsored

speech, which by definition is expressive activity designed to transmit a school's curricular message.

This Court drew a sharp distinction in *Hazelwood* between school-sponsored speech and private student speech, *i.e.*, "a student's personal expression that happens to occur on the school premises." 484 U.S. at 271. The Court had previously dealt with private speech on school grounds in *Tinker*, *supra*, where public school students sued for the right to wear black armbands to school to protest the Vietnam War. In *Tinker*, the Court held that such private speech must be tolerated unless it will "substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 509. In *Hazelwood*, a case upholding school censorship of articles in a high school newspaper produced as part of the school's journalism curriculum, the Court held that the *Tinker* standard was inapplicable, and that educators "are entitled to exercise greater control" over such "school-sponsored speech." *Hazelwood*, 484 U.S. at 271.

Because school-sponsored speech "may fairly be characterized as part of the school's curriculum," *Hazelwood* at 271, viewpoint-based judgments are clearly permissible. "[A] public school prescribing its curriculum . . . will facilitate the expression of some viewpoints instead of others," and that does not offend the First Amendment. *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 674 (1998). Even in the university setting, this Court has never required viewpoint neutrality when it comes to curricular judgments:

> Least of all does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality

> requirement. The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas.

Bd. of Regents v. Southworth, 529 U.S. 217, 243 (2000) (Souter, J. concurring).

This Court underscored the difference between private speech and school-sponsored speech in *Rosenberger*, *supra*, a case the Second Circuit failed to adequately heed.[5] In *Rosenberger*, the Court held that a public university could not withhold funding from certain extracurricular publications based on their viewpoint. *Id.* at 832-37. But the Court was careful to distinguish the extracurricular, "private speech of students" at issue in *Rosenberger* from the curricular, school-sponsored speech addressed in *Hazelwood*:

> A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. *See, e.g.*, . . . *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-272, 108 S. Ct. 562, 569-570, 98 L. Ed. 2d 592 (1988).

515 U.S. at 834.

When students engage in private speech on school grounds, they do so with considerable First Amendment

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5. The Second Circuit dispensed with *Rosenberger* in a footnote, and without much exposition. App. 31a n.10.

protection of their views. *Hazelwood*, 484 U.S. at 266 (students "cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'" (quoting *Tinker*, 393 U.S. at 509)). But when teachers and students are engaged in a curricular activity, the speaker is the school; as the speaker, the school has the right to chose both topic and viewpoint, and teachers have the responsibility to see that the children in their charge "learn whatever lessons the activity is designed to teach." *Hazelwood* at 271.

If, during the course of a lesson, a student voices a view different from the view being taught, the teacher, in her professional discretion, may choose to incorporate that view into the curricular activity, but if she chooses not to do so, she should not, as the Second Circuit would have it, be required to prove a "compelling state interest" for her decision or else be second-guessed by a federal judge or jury. If a student feels his teacher did not show his alternative view (*e.g.*, that democracy is bad or that dinosaurs still roam the earth) sufficient credence as part of the curricular activity, he is free to lobby his classmates and school officials to his side by expressing his view in the hallway, on the playground, or on a t-shirt he wears to class the next day, as long as his expression does not "substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, 393 U.S. at 509. But under *Hazelwood*, his teacher need not change her lesson plan to incorporate his opinions. To hold otherwise, as the Second Circuit did below, is to find that "'the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students,'" something this Court has wisely refused to do.

Hazelwood, 484 U.S. at 271 n.4 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (quoting *Tinker*, 393 U.S. at 526 (Black, J. dissenting)).

School officials may have trouble proving that their censorship of a child's views is reasonably related to legitimate pedagogical concerns when the assignment is truly one that invites the students to express their own views on a subject. For example, the assignment which divided the Third Circuit in *C.H. ex rel. Z.H. v. Oliva*, *supra*, asked students to create posters showing "what they were thankful for" at Thanksgiving. But in this case the Second Circuit expressly found that Ms. Weichert's poster assignment did *not* solicit the kindergarteners' personal views on how to save the world. As the Second Circuit found, Ms. Weichert's poster assignment was "given under highly specific parameters . . . to reflect what had been taught in the kindergarten environmental unit." App. 21a.

Furthermore, as the Tenth Circuit noted, "the *Hazelwood* analysis does not give schools unbridled discretion over school-sponsored speech. A number of constitutional restraints continue to operate on public schools' actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause and substantive due process." *Fleming*, 298 F.3d at 934. But here, the Pecks abandoned their claims under the Free Exercise Clause and the Equal Protection Clause. App. 2a n.1, and the Second Circuit upheld the dismissal of their Establishment Clause claim, finding the record contained no evidence of "hostility towards religion." App. 35a. Under these circumstances, requiring the School District to proffer a "compelling state interest" for its refusal to display Antonio's picture of Jesus at the kindergarten environmental assembly violates the letter and intent of *Hazelwood*.

III. IMMEDIATE REVIEW IS PROPER.

The Second Circuit's misinterpretation of *Hazelwood* was fundamental to its decision to remand the Pecks' free speech claim for trial. The question the Second Circuit framed for trial, *i.e.*, whether the School District engaged in "viewpoint discrimination," is premised on its mistaken holding that viewpoint-based restrictions on school-sponsored speech are "prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." App. 31a. Because viewpoint-neutrality has become the central issue in this lawsuit, the Court should grant immediate review. *See, e.g., Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) ("[A]lthough the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'") (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 18, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: May 27, 2005 Decided: October 18, 2005)

Docket No. 04-4950-cv

ANTONIO PECK, a minor by and through his parents and next friends, JoAnne Peck and Kenley Lester Peck,

Plaintiff-Appellant,

–v.–

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE MCNAMARA ELEMENTARY SCHOOL, ROBERT CREME, individually, and in his official capacity as principal of Catherine McNamara Elementary School, and Theodore Gilkey, individually, and in his official capacity as Superintendent for Baldwinsville School Board of Education,

Defendants-Appellees.

Before:

CALABRESI, KATZMANN, AND B.D. PARKER,

Circuit Judges

Appendix A

Appeal from the grant of summary judgment to Defendants-Appellees. Held that summary judgment should be vacated in part and affirmed in part.

CALABRESI, *Circuit Judge*:

This case invites us to cut a path through the thorniest of constitutional thickets—among the tangled vines of public school curricula and student freedom of expression.

Plaintiff-Appellant Antonio Peck ("Antonio"), by and through his mother ("JoAnne Peck") and father (collectively, "the Pecks"), filed this Section 1983 action against Antonio's school district, Baldwinsville Central School District, the principal of Antonio's elementary school, Robert Creme, and the district superintendent, Theodore Gilkey (collectively, "The District"). The Pecks alleged that officials at Antonio's elementary school had censored one of his school assignments to exclude religious content, and had thereby violated both the Establishment Clause and Antonio's First Amendment right to free speech.[1] The district court (Mordue, *J.*) dismissed both claims on summary judgment, concluding, as a matter of law, that a) The District's censorship of Antonio's assignment was viewpoint neutral, b) the censorship was justified by legitimate pedagogical concerns, and c) The District's actions bespoke neither State-advancement nor State-inhibition of religion.

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1. The original complaint stated additional claims of denial of Equal Protection and abridgment of Antonio's First Amendment right to the free exercise of his religion. Those claims have been abandoned on appeal.

Appendix A

We now affirm the district court's determination that no Establishment Clause violation attended The District's actions, but vacate and remand the court's disposition of the Pecks' free speech claims.

I. Background

The following facts, contained in the record on The District's motion for summary judgment, are recounted in the light most favorable to the Pecks.

THE POSTER ASSIGNMENT AND THE SCHOOL RESPONSE

During the 1999-2000 school year Antonio was a kindergarten student at the Catherine McNamara Elementary School, enrolled in a class taught by Susan Weichert ("Weichert"). Part of the kindergarten curriculum taught by Weichert was a two-month environmental unit that, according to Weichert's deposition testimony, focused on "simple ways to save the environment, such as preserving trees and animals, using water and other natural resources sparingly and wisely, keeping the environment clean, et cetera." The unit culminated, near the end of the school year, in an assignment in which students in the class were instructed to create a poster showing what they had learned about the environment. Weichert described the instructions about the assignment that she gave to her class in the following way:

> We wanted them to create a poster at home showing some of the things that we had been learning throughout the two months and

> previously all the way back to September about ways that they could help the environment. . . . [W]e discussed to the children that they needed to show us in their assignment what they had been learning the last couple of months in class during our environmental units, that their poster should reflect what they had been learning in class.

Each child would also be given an opportunity to present his or her poster to the class, and to explain what the poster showed and how its content related to the environment.

In addition to the poster project, all four kindergarten classes at Catherine McNamara Elementary School also put on an environmental assembly. The assembly, an annual event to which parents of the students were invited, took place in the school cafeteria and consisted of students planting a tree and singing environmentally-themed songs. In addition, the kindergartners' posters would be displayed at the assembly.

Weichert sent two notes home to the parents of her kindergartners in connection with the poster assignment and the environmental assembly. The first, inviting parents to the assembly and explaining the contours of the poster assignment, stated:

> Dear Parents,
>
> We are writing to inform you about our environmental program that we will be presenting to the parents on June 11th. . . . [As] in previous years, as part of our environmental program and

as a culminating activity, we will plant a tree on the school grounds. To raise funds to purchase this tree, we have asked the children to bring in returnable cans. We will start collecting cans immediately. We appreciate your involvement in this project.

To enhance the student's understanding of his environment, we are asking students to make an environmental poster at home and bring it to school by June 4th. These posters will be on display at our program. The children may use pictures or words, drawn or cut out of magazines or computer drawn by the children depicting ways to save our environment, i.e. pictures of the earth, water, recycling, trash, trees etc. This should be done by the student with your assistance. The poster should be able to fit in the child's backpack. We hope this project will be fun for all!

Subsequently, a second note was sent home announcing a time change in the June 11 program, and reminding parents that "each student should be working on his environmental poster to be hung up at the program. Ideas should involve ways to save our earth and it should be the child's work. Pictures drawn, cut out of magazines, or computer drawn are all great ideas."

JoAnne Peck described in her deposition testimony the process by which Antonio prepared his poster assignment. Peck stated that she and Antonio sat down together one night to do the poster, and she told Antonio that the school wanted

him to do a poster on how to save the environment. Antonio responded, according to Peck, that the only way to save the world was through Jesus. Peck then provided Antonio with art materials and some magazines, and Antonio selected pictures, cut them out, and, with his mother's assistance, arranged them on a piece of paper. Antonio (who could not read) told his mother what he wanted the poster to say, and Peck wrote out what Antonio said so that he could include the words on to the poster.

This poster, which was turned in to Weichert, was comprised of the following images: a robed figure (who is described by both parties as "Jesus") kneeling and raising his hands to the sky, two children on a rock bearing the word "Savior," and the Ten Commandments. Written on the poster were the phrases, "the only way to save our world," "prayer changes things," "Jesus loves children," "God keeps his promises," and "God's love is higher than the heavens."

Upon receiving Antonio's poster Weichert took it to the school principal, Robert Creme ("Creme"). Creme told Weichert that Antonio should be instructed to do another poster. Creme also contacted Superintendent Theodore Gilkey ("Gilkey") to tell him of the situation and of how Creme had decided to handle it. Gilkey agreed with the decision to have Antonio prepare a second poster.

Some time after Antonio turned in his first poster, JoAnne Peck attended an art show at the elementary school. At the show she saw Weichert, who told her, for the first time, that Antonio's poster would not be displayed at the environmental assembly. According to Peck, Weichert stated that "she legally

didn't think she could hang the poster for religious reasons," and also that the poster didn't demonstrate Antonio's learning of the environmental lessons. Peck subsequently contacted Creme, who told her that Antonio could make a new poster with "a little bit of religious content and more showing the recycling, kids throwing trash. . . . [or] kids holding hands around the world."[2]

Soon thereafter, Antonio and his mother sat down together to do a second poster. According to Peck's deposition testimony, she again assisted Antonio in selecting images (from the computer and from a religiously-themed coloring book), and in arranging pictures on the poster. The second poster depicted, on its left side, the same robed, praying figure pictured in the first poster. It also showed, in the center, a church with a cross. To the right of the church were pictures of people picking up trash and placing it in a recycling can, of children holding hands encircling the globe, and of clouds, trees, a squirrel, and grass.

After receiving the second poster Weichert again took it to Creme, who, according to Weichert, stated "[t]hat there were portions of the poster . . . that clearly showed an understanding of some of the things that I had been teaching in the environmental unit [and] there was a portion that didn't relate to what . . . had been t[aught]." Creme then told Weichert "that we should hang the poster [at the environmental program] with the kneeling figure folded under."

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2. The Pecks do not, at this stage of the litigation, base any of their claims on The District's conduct in relation to the first poster.

Appendix A

Notwithstanding Creme's determination that Antonio's second poster was partly unacceptable, Antonio was allowed to "show and tell" his poster to his own kindergarten class. According to Weichert, when Antonio presented his poster she asked him "to explain the poster to the class and how he could help the earth.... He said you could pick up trash and help keep the earth clean." Antonio did not mention the robed figure or the church, or make any reference to God or religion, in his explanation. Weichert never asked Antonio— either during his presentation, or privately—to explain the significance of the robed figure.

Antonio's poster was displayed at the June 11 environmental assembly, alongside those of approximately eighty other kindergartners, on the wall of the school cafeteria. Pursuant to Creme's instructions, however, Weichert asked the parent volunteer who was hanging the posters to place Antonio's on the wall with the robed figure (the left-hand side of the poster) folded under. Apparently because of a mistake made by the parent volunteer, a greater portion of the poster than Weichert had intended was concealed: the poster was ultimately displayed with both the robed figure and half of the church folded under. Only the right half of the church (including the cross) was visible, along with the above-described images of recycling, children holding hands, and the nature-related pictures. Antonio's poster, folded as thus described, was smaller than some of the other students' projects, but was the same size as others.

Appendix A

EVIDENCE CONCERNING THE DISTRICT'S MOTIVATIONS

Several aspects of Weichert's and Creme's deposition testimony were particularly relevant to the question of The District's rationale for censoring Antonio's poster.

With respect to the first poster turned in by Antonio, Weichert testified that she took the poster to Creme because she

> didn't know what to do with this specific poster which, number one, did not deal with anything that . . . had [been] taught in the classroom for the last nine months and Antonio had, as far as [she] could see, gone over and above the bounds of [the] assignment. Didn't have anything to do with [the] assignment.

Creme, for his part, testified that he had four reasons for deciding that Antonio should redo the first poster: a) because the poster had "absolutely no relevance or relationship to the assignment at all"; b) because, based on his familiarity with Antonio's reading and writing ability and knowledge of abstract concepts, he "was quite certain that [the poster] was not Antonio's work, at least not in conceptual form"; c) because he knew that Weichert would be asking the children to present the posters to the class, and that, since Antonio would be unable to read the poster, Weichert would have to read it for him,[3] and d) because the poster did not

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3. Creme elaborated that Weichert's reading of the poster was problematic for two reasons: a) because it would "put Antonio in a (Cont'd)

utilize and reinforce the concepts presented in class, and therefore did not accomplish the goals of the assignment. With respect to Antonio's second poster, Creme stated that he "did not object to [it] solely on its religious content," but also on the grounds that the kneeling figure was "an exact replication of something . . . that we had every reason to believe Antonio was not responsible for," that the kneeling figure had "no relevance . . . to the assignment he was given," and that the poster was "not Antonio's work."

Much of Creme's deposition consisted of questions concerning his hypothetical response to poster assignments that contained imagery that was beyond the scope of what had been taught during the environmental unit, but that was non-religious—for example, pictures of animals not discussed in class. In each case, Creme stated that his response would depend upon the student's explanation as to why the image was shown on the poster. Thus, Creme stated that if Weichert had received a poster showing a manatee, an animal that had not been covered in the environmental unit, "[e]ducationally what [she] should do is begin asking a series of questions. What she does beyond that point would be solely dependent on the response of the student, the rest of the students in the class and wherever the direction went." Like Weichert, Creme never asked Antonio to explain the relevance to the environmental unit of the images on either

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(Cont'd)
situation where he would be embarrassed in front of his peers by not being able to explain anything on this poster," and b) because it would "put Mrs. Weichert in the position of having to explain it to the class, thereby having it come from her and in effect become part of her instruction."

of his posters. But Creme also testified that the ultimate decision of whether to accept a hypothetical poster that contained religious imagery and that did meet all of his objections to Antonio's poster—*i.e.*, that was the student's work, that did represent the conceptual level of learning of which the student was capable, and that had a relationship to the assignment that could be adequately explained by the student—depended ultimately on "a whole bunch of other factors" that he was unable to predict.

Weichert, too, was asked, during her deposition, about how she would react to hypothetical posters that depicted topics not specifically discussed during the environmental unit, but were non-religious, or that were religious but were accompanied by an explanation of their relevance to the assignment. Weichert testified, for example, that if a child had put a Sierra Club logo, or a picture showing a forest fire, or a manatee on the poster, Weichert would have displayed it so long as the student could explain to her how the images pertained to saving the environment. Weichert also stated that, even if Antonio had explained to her the relevance of God or religion to the topics discussed during the environmental unit, she still would not have accepted the first poster, or displayed the censored portion of the second poster. In this respect she stated:

> [I]f God is going to save the environment, that isn't something that we discussed in the classroom. . . . [A] religious overtone to the saving of the earth . . . was not taught in the curriculum in kindergarten. Therefore, I would not

> have accepted it because it was not taught in what the children could do to help the earth.

Also on this point Weichert said, "If [an] item [on a poster] is talking religion even though it's saving the environment, it's still religiously saving the environment which is not something that was ever discussed in the classroom." Finally, Weichert testified that she believed that, had the "purely religious" aspects of Antonio's poster been displayed at the environmental assembly, parents in attendance might have believed that Weichert had included religious instruction in the environmental unit.

PRIOR PROCEEDINGS

This case came to us once before, following the district court's grant of The District's pre-answer motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The court treated the motion as one for summary judgment, and dismissed all of the Pecks' claims. In an unpublished order, our court held that the Rule 12(b)(6) conversion to a summary judgment motion was done without sufficient notice to the Pecks, and, as a result, deprived the Pecks of the opportunity to take discovery and present evidence on several key disputed facts. *See Peck v. Baldwinsville Sch. Bd.*, 7 Fed.Appx. 74, 2001 WL 303755 (2d Cir. March 28, 2001). In particular, we noted that further discovery might uncover a) evidence of animus or hostility by The District toward Christianity or toward religion generally, and b) indications as to the accuracy of The District's claim that Antonio's poster was not responsive to the assignment. Depending upon the fruits of discovery, we

observed, "the case would be very different from a motivation stemming from a legitimate pedagogical concern." *Id.* at *2. Accordingly, we vacated the judgment and remanded the case to the district court.

On remand, and following discovery, The District moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The motion was granted as to all claims, and the instant appeal ensued.

II. Discussion

A. Standard of Review

Our standard of review on appeals from a decision on summary judgment is familiar. We review *de novo* the district court's grant of summary judgment, affirming only if the movant has demonstrated that there is no genuine issue as to any material fact and, hence, that judgment as a matter of law is warranted. *See, e.g., Make the Rd. by Walking, Inc. v. Turner,* 378 F.3d 133, 142 (2d Cir.2004); *see also* Fed.R.Civ.P. 56(c). In determining whether a case presents triable factual issues, we, like the district court, may not make credibility determinations or weigh the evidence, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and we must resolve all ambiguities and draw all permissible factual inferences in favor of the non-moving party, *see Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 124 (2d Cir.2005).

B. Free Speech Claim

The Pecks' first argument on appeal is that the district court erred in its conclusion that no triable issues of fact had been raised in connection with their claim that The District's censorship of Antonio's poster violated Antonio's First Amendment right to free speech.[4] The Pecks contend a) that the court erroneously analyzed The District's actions under the rubric set forth by the Supreme Court in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), rather than under the more speech-protective standard of *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); and b) that, even under the standards enunciated in *Hazelwood,* disputed issues of material fact had been raised with respect to the reasonableness and viewpoint neutrality of The District's actions. Although we agree with the district court that *Hazelwood,* rather then *Tinker,* provides the applicable framework for our analysis of the speech restrictions at issue in this case, we think that the Pecks have raised genuine issues of material fact under that standard, and therefore agree with the Pecks that summary judgment should not have been granted as to the free speech claim.

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4. The First Amendment's admonition that "Congress shall make no law . . . abridging the freedom of speech" has, of course, been applied to state governments through the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Appendix A

1. Applicable Level of Constitutional Scrutiny

Because the level of judicial scrutiny that must be applied to state actions inhibiting speech varies with the nature of the forum in which the speech occurs, we must first consider what sort of forum had been created for the environmental poster assignment. *See Make the Rd. by Walking*, 378 F.3d at 142. Following the lead of the Supreme Court, we have tended to classify fora for expression in four categories that, correspondingly, fall along a spectrum of constitutional protection. The first, and most speech-protective forum is the "traditional public forum." This category is comprised of those places—streets, parks, and the like—"which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (internal quotation marks omitted). In these fora, "[c]ontent-based restrictions will be upheld only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end." *Id.* (internal quotation marks and alterations omitted).

The "designated public forum," and its subset, the "limited public forum," fall next along the spectrum. *Id.* at 142-43. A "designated public forum" is a place not traditionally open to public assembly and debate—a public school, for example—that the government has taken affirmative steps to open for general public discourse. *Id.* Speech in a designated public forum is entitled to the same constitutional protection as that extended to expression in a traditional public forum, so long as the state continues to designate the forum for such use. *Id.* at 143. A "limited public

forum," instead, is created when the State "opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Hotel Employees & Rest. Employees Union Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir.2002). In limited public fora, the government may make reasonable, viewpoint-neutral rules governing the *content* of speech allowed. *Id.* at 545-46; *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001).

Garnering the lowest level of scrutiny along the forum analysis spectrum is the "non-public forum,"[5] which is neither traditionally open to public expression nor designated for such expression by the State. "Restrictions on speech in a nonpublic forum need only be reasonable and viewpoint neutral." *Make the Rd. by Walking*, 378 F.3d at 143; *see also Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) ("Although a speaker may be excluded from a

5. The Supreme Court has indicated, and our cases have echoed, that when the government restricts its *own* speech, the appropriate level of judicial scrutiny falls somewhere off the above-described spectrum of forum analysis. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (stating that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"); *Make the Rd. by Walking*, 378 F.3d at 151 ("When the government is the sole speaker, it need not ensure viewpoint diversity and can simply express its own viewpoint. Only where the government allows private parties to express their personal views in a nonpublic forum is it required to avoid viewpoint discrimination.").

nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." (internal citations omitted)).

The parties apparently agree that neither Antonio's classroom, nor the school cafeteria, nor any other aspect of the Catherine McNamara Elementary School, was a traditional public forum. They also agree that none of these was a forum that had been designated for public expression, and the record clearly supports this position. No evidence points to any affirmative steps taken by The District, in the context of the events pertaining to this case, to open these facilities to *public* use and expression. *Cf. Hazelwood,* 484 U.S. at 267, 108 S.Ct. 562 ("[S]chool facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or by some segment of the public. . . . If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. . . ."). Hence, there is no dispute that The District was entitled, in the non-public fora at issue in this case, at least to regulate the content of Antonio's poster in a reasonable manner. *See Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439.

The parties do, however, contest the nature of—and level of constitutional protection to be accorded to—the student expression represented by Antonio's poster. The Supreme

Court has recognized that, while "[s]tudents in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" *Hazelwood*, 484 U.S. at 266, 108 S.Ct. 562 (quoting *Tinker*, 393 U.S. at 506, 89 S.Ct. 733), nevertheless "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment.'" *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and *Tinker*, 393 U.S. at 506, 89 S.Ct. 733). These "special characteristics" have led the Supreme Court to identify, broadly, two categories of student expression in the school environment, each of which merits a different degree of judicial scrutiny in connection with school-imposed speech restrictions.

The first category, encompassing students' "personal expression that happens to occur on the school premises," was explored by the Court in *Tinker*, a case that considered a school district's punishment of junior high and high school students who wore black armbands to school in opposition to the Vietnam War. In holding that the First Amendment did not permit such silencing of student opinion, the Court stated:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of

> attending school; it is also an important part of the educational process. . . . When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so *without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.*

Id. at 512-13, 89 S.Ct. 733 (internal footnote, quotation marks, and alteration omitted and emphasis added).

Almost twenty years later, the Court in *Hazelwood* considered the relevance of *Tinker*'s "material and substantial interference" test for school censorship of student expression in the context of a class assignment. The speech at issue consisted of two articles that were written by students in a high school journalism class and that were to appear in a school newspaper published as part of the class's curriculum. The articles addressed pregnancy in the high school and the impact of divorce on the school's students. The school principal objected to their publication on the grounds that a) the pregnancy articles contained insufficient protections for the sources' anonymity and addressed subject matter that was too sensitive for the school's younger students, and b) that the author of the divorce article had not given the parents of some students profiled in the piece the opportunity to respond

to some of the students' allegations.[6] *Hazelwood*, 484 U.S. at 262-64, 108 S.Ct. 562.

In assessing the Hazelwood School District's actions, the Court deemed *Tinker* inapposite to the context of student expression that the court characterized as curricular and, hence, "school-sponsored":

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as *part of the school curriculum*, whether or not they occur in a traditional classroom setting, so long as they are *supervised*

6. In addition, as the Court's opinion recounts, several other, otherwise unobjectionable articles were censored because they had been slated to appear on the same pages as articles that the principal ordered removed, and there was, according to the school, insufficient time prior to publication to reformat the newspaper. *Hazelwood*, 484 U.S. at 264 n. 1, 108 S.Ct. 562.

> *by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*

Id. at 270-71, 108 S.Ct. 562 (emphasis added). *Tinker*'s "material and substantial interference" standard was, in the Court's view, insufficiently deferential to the prerogative of educators to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271, 108 S.Ct. 562. Accordingly, *Hazelwood* held, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns.*" *Id.* at 273, 108 S.Ct. 562 (emphasis added and footnote omitted).

Contrary to the Pecks' contention that "[i]t is difficult to see how the Plaintiff's poster is any different than the armbands worn in the *Tinker* case," we think it clear that the facts in the record bring Antonio's poster, the vehicle of his censored expression, within *Hazelwood's* framework. It is undisputed that the poster was prepared by Antonio pursuant to a class assignment, and one that was given under highly specific parameters: to "depict[] ways to save our environment" and to reflect what had been taught in the kindergarten environmental unit.[7] Additionally, the posters

7. We are unpersuaded by the Pecks' contention that, based on the letters sent home to the kindergarten parents, in which the poster

(Cont'd)

were to be displayed at a school-sponsored assembly, to take place in the school cafeteria, to which parents of the kindergartners were invited. Aside from the students' posters, the environmental assembly included songs and other presentations that were prepared as part of the kindergarten curriculum.

These undisputed facts demonstrate that the poster assignment and the environmental assembly at which the posters were hung—perhaps even more starkly than in the context of the newspaper articles at issue in *Hazelwood*—were indisputably "part of the school curriculum .... supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271, 108 S.Ct. 562. *See also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir.2004) ("Few activities bear a school's 'imprimatur' and 'involve pedagogical interests' more significantly than speech that occurs within a classroom setting as part of a school's curriculum." (quoting *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir.2002)); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1214 (11th Cir.2004)

(Cont'd)

assignment was described without reference to the requirement that the posters address topics discussed in class, triable issues have been raised as to the scope and open-endedness of the poster assignment. It is undisputed that Weichert, as she described in her deposition testimony, instructed Antonio's class to create a poster that reflected the topics addressed in class. Whether the parents had an identical or different understanding of the goals of the poster project does not alter the fact that, as delivered to the students, the assignment was not open-ended.

(finding that a student's murals constituted school-sponsored expression because they were located in prominent school locations where members of the public might reasonably believe that they bore the imprimatur of the school); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155-56 (6th Cir.1995) ("Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum.").

Accordingly, we find the case before us to fall within the core of *Hazelwood* 's framework. And, the district court correctly concluded that the *Hazelwood* "reasonable relation to legitimate pedagogical concerns" test provides the appropriate lens through which to examine The District's censorship of Antonio's poster.

2. Application of *Hazelwood*

a) Was there a fact question as to viewpoint discrimination?

We must ask, then, whether the record demonstrates triable issues as to whether The District's reasons for censoring Antonio's poster are, in the language of *Hazelwood*, "reasonably related to legitimate pedagogical concerns." *Id.* The parties agree that the relevant "pedagogical concerns" proffered by The District are: a) that the portion of Antonio's poster depicting the robed figure was not responsive to the assignment; b) that the placement of that image on the poster was not Antonio's own work; and c) that showing the image risked creating the impression that the kindergarten environmental unit had included the teaching of religion. The

Pecks contend that it cannot be said as a matter of law that these concerns pass muster under *Hazelwood* a) because factual disputes foreclose a determination, on summary judgment, as to the reasonableness of the school's judgment that Antonio's poster implicated legitimate pedagogical concerns,[8] and b) because the record may be read to support a finding that The District's enforcement of these interests was carried out in a non-viewpoint-neutral manner.

We reject some of the Pecks' arguments concerning The District's treatment of Antonio's poster—their claim, for example, that Weichert and Creme incorrectly determined that JoAnne Peck, rather than Antonio, was responsible for the poster's content—on the ground that they overstate the scrutiny that *Hazelwood* contemplates applying to The District's cited interests. In *Hazelwood* itself, the Court did not inquire into the *accuracy* of the principal's contention that because of time concerns, censorship of the articles in question, rather than judicious editing, was required. The Court found the principal's judgment on this score reasonable, notwithstanding that he "did not verify whether the necessary modifications could still have been made in

8. We note that the Pecks do not seriously dispute the legitimacy, at least in the abstract, of the pedagogical concerns cited by The District. Unquestionably, whether a student's work is responsive to an assignment, whether the student is responsible for the work he or she has turned in, and whether the display of a school-sponsored, religious student speech might be perceived as promoting or instructing religious perspectives are interests that are part and parcel of a school's responsibility to ensure that "participants learn whatever lessons the activity is designed to teach" and that "the views of the individual speaker are not erroneously attributed to the school." *See Hazelwood*, 484 U.S. at 271, 108 S.Ct. 562.

the articles," and that the faculty supervisor did not "volunteer the information that printing could be delayed until the changes were made." *Hazelwood*, 484 U.S. at 275, 108 S.Ct. 562. "The *Hazelwood* standard does not require that the guidelines be the *most* reasonable or the *only* reasonable limitations, only that they be reasonable." *Fleming*, 298 F.3d at 932 (internal quotation marks omitted, alteration omitted, and emphasis added). Just as *Hazelwood* requires only that the school's employed method of censorship be reasonable, we similarly conclude that the predicate factual determinations made by the school in triggering the censorship need only be reasonable. Here, because Weichert and Creme made a reasonable determination that JoAnne Peck (and not Antonio) was responsible for the poster's content, we decline any invitation to assess the accuracy of this determination. If this were the only factual dispute raised by the Pecks, we most likely would affirm the district court's judgment as to the reasonableness of The District's actions.

Other fact questions to which the Pecks point, however, implicate a more troubling concern: the viewpoint neutrality of The District's decision with respect to Antonio's poster. The district court concluded that there were no triable issues as to whether The District had engaged in viewpoint discrimination because, it said, the robed figure shown on Antonio's poster was unquestionably beyond the scope of the poster assignment. It therefore was not speech addressed to an otherwise permissible subject, that was censored on the basis of its viewpoint on the subject. In our judgment, however, the district court overlooked evidence that, if construed in the light most favorable to Pecks, suggested that Antonio's poster was censored *not* because it was

unresponsive to the assignment, and not because Weichert and Creme believed that JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment.

We recognize at the outset that drawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which traditionally has been prohibited *even* in non-public fora, is, to say the least, a problematic endeavor. As the Supreme Court has observed, particularly in the context of religious expression, it can be difficult to discern what amounts to a subject matter unto itself, and what, by contrast, is best characterized as a *standpoint* from which a subject matter is approached. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history."). *Compare Good News Club*, 533 U.S. at 107-08, 121 S.Ct. 2093 (characterizing a group's meetings for prayer and religious discussion as offering one perspective on morals and character, which were otherwise permissible topics in the limited public forum at issue); *with id.* at 131-33, 121 S.Ct. 2093 (Stevens, *J.*, dissenting) (characterizing the meetings not as offering a "religious viewpoint" but as constituting otherwise-prohibited "religious proselytizing").

Nevertheless, we think that there are at least disputed factual questions, which may not be resolved on summary judgment, as to whether Antonio's poster offered a "religious viewpoint," and whether, if the poster had depicted a purely secular image that was equally outside the scope of Weichert's environmental lessons, it would similarly have been censored. As described above, Weichert testified that there were a number of potential images that Antonio could have placed on his poster, such as specific endangered species, the Sierra Club logo, and atoms, all of which would have been non-responsive to the assignment to the extent that such topics were not specifically covered in class. She indicated that she would not have folded over such images: "I can't imagine that there would have been any parent that would have objected to a manatee because they wouldn't have construed it as anything other than an animal . . . Because it had no religious significance, . . . therefore I wouldn't have had to worry about anybody being offended by-no strike, not be offended, anyone would surmise that I may have been teaching religion in kindergarten." Additionally, both she and Creme testified that had such images appeared on a student's poster, the student would have been asked the relevance of the picture to what he had learned in class. As both Weichert and Creme acknowledged, however, Antonio was never asked directly whether the robed figure bore any connection to the environment. One possible interpretation, of course, is that Weichert and Creme viewed the Jesus image as being so wholly outside the scope of the curriculum that further inquiry was unnecessary before censoring the image, and that they would have also censored a secular image that was equally non-responsive. On summary judgment, however, we must draw all factual inferences in favor of the Pecks. In this

regard, we think that it is also possible to interpret the testimony of Weichert and Creme as indicating that they were particularly disposed to censor Antonio's poster because of its religious imagery and that they would not necessarily have similarly censored secular images that were equally non-responsive. Were these facts ultimately proved, The District's actions might well amount to viewpoint discrimination.

b) Does *Hazelwood* permit viewpoint discrimination "reasonably related to legitimate pedagogical concerns"?

The District counters that, even assuming there to be evidence that its decision was based on the *viewpoint* rather than the *content* of Antonio's poster, the district court's dismissal of the free speech claim would still have been proper because *Hazelwood* permits schools to discriminate on the basis of viewpoint—so long as such discrimination is, itself, reasonably related to a legitimate pedagogical interest. Whether *Hazelwood* represents a departure from the long-held requirement of viewpoint neutrality in any and all government restriction of private speech, *see, e.g., Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510 ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."), is an issue that has been the subject of much

debate among Circuit Courts, which have reached conflicting conclusions.[9]

As the varying approaches of other courts suggest, the proper answer to the question of whether *Hazelwood* contemplates "reasonable" viewpoint discrimination by

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9. The First and Tenth Circuits have expressly held that educators may make viewpoint-based decisions about school-sponsored speech. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir.1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir.2002). The Ninth Circuit and Eleventh Circuits have, instead, decided that *Hazelwood* did not alter the general requirement of viewpoint neutrality in non-public fora. *See Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir.1991) (en banc) (applying, without discussion, *Cornelius* viewpoint neutrality standard to a nonpublic school forum); *Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir.1989); *see also Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010-11 (9th Cir.2000) (noting that "despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit," but deciding, ultimately, that *Hazelwood* did not supply the appropriate standard for the issue before it). A panel of the Third Circuit held that a viewpoint restriction "may reasonably be related to legitimate pedagogical concerns" and therefore constitutional, but on a rehearing en banc, the circuit was equally-divided on the question. *See C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir.1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir.1999), *on reh'g en banc* 226 F.3d 198 (3d Cir.2000) (affirming the district court judgment regarding one expressive act without explication and deciding the remaining expressive issue on procedural grounds, thereby obviating the need to reach the viewpoint neutrality question).

school administrators in the context of school-sponsored speech is anything but clear. On the one hand, much of *Hazelwood*'s discussion of the proper role of school officials in making curricular judgments seems to suggest that viewpoint-based judgments would be permissible, and perhaps even desirable, at least under some circumstances. *See, e.g., Hazelwood,* 484 U.S. at 272, 108 S.Ct. 562 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy." (internal quotation and citation omitted)). On the other hand, the Court in fact had no occasion to consider whether such circumstances *were* present in the case before it: The high school apparently had conceded that only viewpoint neutral restrictions on access to the school newspaper would have passed constitutional muster. *See id.* at 287 n. 3, 108 S.Ct. 562 (Brennan, *J.*, dissenting).

We also find it significant that *Hazelwood* analyzed the nature of the expressive forum created by the high school newspaper at issue in the case, and relied, in that analysis, on its prior decisions in *Cornelius* and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). *See Hazelwood,* 484 U.S. at 267-70, 108 S.Ct. 562. Both *Cornelius,* in the context of a non-public forum, and *Perry,* in the context of a limited public forum, stated that government speech regulations that discriminated among viewpoints were prohibited under the First Amendment. *See Cornelius,* 473

U.S. at 811, 105 S.Ct. 3439 (stating that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination," and remanding the case for a determination of whether the government's otherwise-reasonable speech restrictions were impermissibly viewpoint discriminatory). Yet *Hazelwood* never distinguished the powerful holdings of these cases with respect to viewpoint neutrality, or, for that matter, even *mentioned*, explicitly, the question of viewpoint neutrality. And we are reluctant to conclude that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule *Cornelius* and *Perry*—even in the limited context of school-sponsored student speech.[10]

For the foregoing reasons, we decline The District's invitation to depart, without clear direction from the Supreme Court, from what has, to date, remained a core facet of First Amendment protection. *Compare Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir.1989) ("Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral."). Thus, on the facts and the legal arguments as they are currently developed before us, we conclude that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests.

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10. The Court's subsequent citation to *Hazelwood*, in dicta, for the proposition that viewpoint-based speech restrictions may be appropriate where the State itself speaks, *see Rosenberger*, 515 U.S. at 834, 115 S.Ct. 2510, does not persuade us to the contrary.

In remanding the free speech claim to the district court for further consideration of the viewpoint neutrality issue, however, we do not *foreclose* the possibility that certain aspects of the record might be developed in such a manner as to disclose a state interest so overriding as to justify, under the First Amendment, The District's potentially viewpoint discriminatory censorship. For example, The District has proffered its interest in avoiding the perception of religious *endorsement* as a rationale for not including Antonio's full poster in the environmental assembly. On the facts before us we cannot say, at this time, as a matter of law that The District's concern in this regard would justify viewpoint discrimination. *Compare Widmar v. Vincent*, 454 U.S. 263, 270-71, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (concluding that avoidance of a violation of the Establishment Clause could constitute a compelling state interest to justify a content-based restriction in a limited public forum), *with Locke v. Davey*, 540 U.S. 712, 730 n. 2, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (Scalia, *J.*, dissenting) ("[A] State has a compelling interest in not committing *actual* Establishment Clause violations. We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns." (internal citation omitted)), *and Good News Club*, 533 U.S. at 112-19, 121 S.Ct. 2093 (observing that, since the Court had never upheld viewpoint discrimination on the ground that it was necessary to prevent an Establishment Clause violation, it remained "not clear" whether the Establishment Clause constituted a constitutionally-viable justification for such discrimination).

We think it prudent to leave it to the district court, in the first instance, to ascertain whether The District's actions were necessary to avoid an Establishment Clause violation, and if so, whether avoidance of that violation was a sufficiently compelling state interest as to justify viewpoint discrimination by The District.[11]

C. Establishment Clause Claim

The Pecks also appeal the district court's dismissal of their Establishment Clause claim against The District. They argue that triable issues exist on the question of whether The District's censorship of Antonio's poster had the primary effect of inhibiting Antonio's religious expression, exhibiting

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11. Just as it may be that viewpoint discrimination with respect to religion is justified in a school context by a compelling state interest, such as avoiding a seeming Establishment Clause violation, so viewpoint discrimination, taking into account the particularities of a school context and the vulnerability of young children in it, might be justified with respect to other forms of speech. In other words, a holding that the requirement of viewpoint neutrality perdures in a school context even after *Hazelwood* does not mean that the particular requirements of a school context and of the age of the children involved in such a context may not create a compelling state interest. That is, even so powerful a rule as that there must be viewpoint neutrality is subject to being trumped by the existence of a compelling state interest. And what is a compelling state interest is certainly informed by the fact of a school context and the presence of minor children. In gauging whether there is a compelling state interest though, courts must be exceedingly careful to be sure that the asserted compelling state interest is directly concerned with the state's desire to protect the children in the school and is not motivated by the wish to suppress speech the school and the state do not like.

hostility toward Christianity, and resulting in The District's excessive religious entanglement.

In this Circuit, as the parties appear to agree, the Supreme Court's *Lemon* test continues to govern our analysis of Establishment Clause claims. *See, e.g., DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405-06 (2d Cir.2001) (stating that "[w]e continue in this Circuit to apply the general test first set forth by the Supreme Court in [*Lemon*]," and noting that despite criticism of the test the Supreme Court had declined to overrule it); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir.2001) (applying the *Lemon* test to a challenge to a school district's Earth Day celebration). When presented with an Establishment Clause challenge to a state practice,

> we are required to ask [(1)] whether the government acted with the purpose of advancing or inhibiting religion and [(2)] whether the aid has the effect of advancing or inhibiting religion. We employ three primary criteria to answer the latter question: whether the action or program results in governmental indoctrination; defines its recipients by reference to religion; or creates an excessive entanglement.

DeStefano, 247 F.3d at 406 (internal quotation marks, alterations, and citations omitted).

Applying the above factors to the undisputed facts, we conclude that the district court properly dismissed the Pecks' Establishment Clause claim. We see nothing in the record to

suggest that The District acted, as the Pecks contend, with the purpose of inhibiting religion. As discussed above, two of the three rationales given by the district court for not displaying Antonio's full poster—the concern that the poster was both not responsive to the assignment and that it was not Antonio's work—were wholly secular. While the third stated reason, avoidance of the perception of religious endorsement, is no doubt involved with religion, such a goal does not bespeak an intent to inhibit religion itself. We note as well that the partial censorship of Antonio's poster, resulting in the concealment of the robed figure but the display of a church with a cross, strongly cuts against the Pecks' bare allegation that The District's actions were intended to demonstrate hostility toward religion. In short, no triable issue exists on this score.

As to the "primary effect" inquiry, the Pecks argue that the decision to censor the robed figure on Antonio's poster excessively entangled The District in religious matters. We think it clear, however, that whatever limited religious discernment was entailed in the decision to censor the robed figure (which both parties identify in their briefs as "Jesus"), The District's resulting "entanglement" in religion was *de minimis* at most. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 683, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("We can assume, *arguendo*, that the [city's conduct] advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action . . . . [N]ot every law that confers an indirect, remote, or incidental benefit upon religion is, for that reason alone, constitutionally invalid." (internal quotation marks and alterations omitted)); *Marchi v. Bd. of*

Cooperative Educ. Serv. of Albany, 173 F.3d 469, 476 (2d Cir.1999) ("[W]hen courts adjudicate claims that some governmental activity violates the Establishment Clause, they must be careful not to invalidate activity that has a primary secular purpose and effect and only incidental religious significance.").

We also reject the suggestion by the Pecks that, because Antonio was prevented from expressing his religious perspective in the context of the kindergarten poster project, The District's decision had the impermissible "effect" of inhibiting religion. Whatever merit this claim might have if the Pecks were still pursuing their Free Exercise claim, it has no bearing on the *Lemon* test's inquiry into whether a *reasonable* observer would understand the government action in question to advance or inhibit religion. *See Altman*, 245 F.3d at 75.

For all of the foregoing reasons, we concur with the judgment of the district court that no triable issues exist with respect to The District's alleged Establishment Clause violation. Accordingly, that claim was properly dismissed.

III. Conclusion

The district court's dismissal of the Pecks' free speech claim is VACATED, and its dismissal of the Establishment Clause claim is AFFIRMED. The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED AUGUST 16, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

99-CV-1847

ANTONIO PECK, a minor, by and through his parents and next friends, JO ANNE PECK and KENLEY LESTER PECK,

Plaintiff,

V.

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE MCNAMARA ELEMENTARY SCHOOL, ROBERT CREME, individually and in his official capacity as Principal of Catherine McNamara Elementary School, and THEODORE GILKEY, individually and in his official capacity as Superintendent for Baldwinsville Central School District,

Defendants.

Norman A. Mordue, D.J:

Appendix B

MEMORANDUM-DECISION AND ORDER

BACKGROUND

Defendants move for summary judgment dismissing this action brought on behalf of Antonio Peck ("Antonio"), a kindergarten student at the time of the events in question, against Baldwinsville Central School District ("District"), Catherine McNamara Elementary School ("School"), the School's Principal Robert Creme and the District's Superintendent Theodore Gilkey (collectively "defendants"). Antonio challenges defendants' conduct with respect to two posters he prepared in response to an assignment. Defendants rejected the first poster, which contained religious images, and displayed the second poster with a portion folded under so as to conceal a religious image. Antonio claims that defendants' actions infringed his First Amendment right to freedom of speech and religion, denied him equal protection of the law, and violated the Establishment Clause.

Defendants moved to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). By Memorandum Decision and Order dated February 15, 2000, this Court converted defendants' Rule 12(b)(6) motion into a Rule 56(b) motion, and granted summary judgment on all counts in favor of defendants. *See Peck v. Baldwinsville Cent. School Dist.*, 2000 U.S. Dist. LEXIS 13362 (N.D.N.Y. 2000).

Plaintiffs appealed the decision and on March 28, 2001, the Second Circuit vacated the judgment and remanded the case for discovery. *Peck v. Baldwinsville Cent. School Dist.*,

Appendix B

7 Fed.Appx. 74, 75-76, 2001 WL 303755,*2 (2d Cir. 2001). After plaintiff concluded discovery defendants moved for summary judgment. For the reasons set forth below, the Court grants the motion in its entirety.

SUMMARY JUDGMENT STANDARD

A party moving for summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the Court, viewing the evidence in the light most favorable to the nonmovant and drawing all reasonable inferences in nonmovant's favor, determines that the movant has satisfied this burden, the burden then shifts to the nonmovant to adduce evidence establishing the existence of a disputed issue of material fact requiring a trial. *See Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). If the nonmovant fails to carry this burden, summary judgment is appropriate. *See Celotex*, 477 U.S. at 323. "Only when reasonable minds could not differ as to the import of the evidence is summary judgement proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991).

COMPLAINT

The complaint, filed November 1, 1999, pleads as follows. In June, 1999, Antonio, then six years old,[1] was a

1. There is a discrepancy between the complaint, which states that plaintiff was six years old at the time of the incident in issue, and Jo Anne Peck's affidavit, which states that he was seven years old at the time.

student in Mrs. Weichert's kindergarten class. Mrs. Weichert distributed to the students' parents a letter concerning the kindergarten's environmental assembly to be presented to the parents in the School cafeteria on June 11, 1999. The letter stated that the students were to make an environmental poster at home and that the posters would be on display at the environmental assembly. A second letter reminded parents that the children should be working on their environmental posters and stated that the posters "should be the child's work."

Plaintiff first submitted a poster depicting Jesus praying and other pictures with Christian religious themes. It bore the handwritten words, "the only way to save our world!" Mrs. Weichert and Principal Creme decided that the poster could not be displayed at the assembly, and Mrs. Weichert told Mrs. Peck that Antonio should prepare another poster.

Antonio prepared a second poster which included children picking up trash and placing it in a trash can in front of a church, two adults placing items in a recycling bin and a picture of Jesus praying.[2] Prior to displaying the poster, Mrs. Weichert, with the concurrence of Principal Creme, folded the poster so that the Jesus figure could not be seen.[3]

2. Although plaintiff contends that some people might not think the figure was Jesus, it is undisputed that the figure in fact represented Jesus and that Mrs. Weichert and Principal Creme assumed that the figure was Jesus.

3. Mrs. Weichert testified that she had folded the poster so as to obscure only the Jesus figure (about one-third of the poster), but that apparently the parent volunteer who hung up the poster folded it in half. There is no evidence to the contrary.

Plaintiff claims this conduct has resulted in "ridicule and the belittling of Plaintiff's religious belief, and an embarrassment to him in front of his classmates." Plaintiff further claims that he "desires from time to time to engage in First Amendment protected activity by incorporating religious themes within his schoolwork as appropriate."

In his first cause of action, plaintiff claims defendants impermissibly restricted his exercise of his First Amendment right to freedom of speech. In the second cause of action, he claims defendants impermissibly denied him equal protection of the law by treating him differently from other similarly situated individuals on the basis of his religious viewpoint, expression, and the content of his speech. The third cause of action asserts that defendants impermissibly deprived him of his First Amendment right to the free exercise of religion. The fourth cause of action claims that defendants violated the Establishment Clause of the First Amendment.

Plaintiff asks this Court to grant a permanent injunction enjoining defendants from conduct which obstructs plaintiff's exercise of his constitutional rights, compelling defendants to provide plaintiff equal treatment to those students submitting secular material, and directing defendants to allow plaintiff to express his religious beliefs in his homework and other schoolwork. Plaintiff also seeks a declaratory judgment declaring defendant's conduct and policy unconstitutional, inasmuch as it fails to provide plaintiff with treatment equal to those students submitting secular material and fails to allow plaintiff to express his religious beliefs in his homework and other schoolwork. Plaintiff seeks money damages as well as attorney's fees, costs and expenses under 42 U.S.C. § 1988.

Appendix B

FACTS ON THIS MOTION

Depositions

The record now includes transcripts of the depositions of Antonio, his parents Jo Anne Peck ("Mrs. Peck") and Kenley Lester Peck ("Mr. Peck"), Superintendent Gilkey, Mrs. Weichert and Principal Creme. The facts recited below are based primarily on the depositions and are undisputed unless otherwise indicated.

In June 1999, Antonio was a student enrolled at the School in a kindergarten class taught by Susan Weichert ("Mrs. Weichert"). As part of the class curriculum, Mrs. Weichert taught about the environment throughout the school year and presented an intensive environmental unit during the last two months of the school year. Mrs. Weichert's environmental lessons focused on simple ways to conserve natural resources and on "simple ways to save the environment, such as preserving trees and animals, using water and other natural resources sparingly and wisely, keeping the environment clean, et cetera."

Defendants state: "As the culminating activity of the two month environmental study unit Mrs. Weichert asked each student to create a poster depicting what had been taught in the classroom regarding environmental conservation." It is undisputed that each poster was to be displayed at a year end environmental assembly and that, in addition to the poster exhibition, the assembly would feature kindergartners singing songs with environmental themes and the planting of a tree

purchased with money the students had earned by recycling cans throughout the year.

Plaintiff contends that the poster assignment was not limited to matters discussed in class. He bases this contention primarily on Mrs. Weichert's testimony that she would likely accept a poster with material she had not taught if it was "related to" the material covered in class. He further points to the two letters Mrs. Weichert sent home to the parents regarding the poster and the assembly. The entirety of the first letter, except for two sentences on an unrelated matter, is as follows:

> We are writing to inform you about our environmental program that we will be presenting to the parents on June 11th. . . . Please try to attend, the children are very excited about this program and will spend a lot of time preparing for it. In previous years, as part of our environmental program and as a culminating activity, we will plant a tree on the school grounds. To raise funds to purchase this tree, we have asked the children to bring in returnable cans. We will start collecting cans immediately. We appreciate your involvement in this project.
>
> To enhance the student's understanding of his environment, we are asking students to make an environmental poster at home and bring it to school by June 4th. These posters will be on display at our program. The children may use pictures or words, drawn or cut out of magazines

> or computer drawn by the children depicting ways to save our environment, i.e. pictures of the earth, water, recycling, trash, trees etc. This should be done by the student with your assistance. The poster should be able to fit in the child's backpack. We hope this project will be fun for all!

The second letter explained a change in the time of the afternoon assembly and stated:

> The children are working very hard on all the songs and poems they will be sharing with you.
>
> Also a reminder that each student should be working on his environmental poster to be hung up at the program. Ideas should involve ways to save our earth and it should be the child's work. Pictures drawn, cut out of magazines, or computer drawn are all great ideas.

Antonio first submitted a poster bearing images he had cut out of children's religious publications and pasted on the poster. Each cut-out image contained religious imagery or phrases and included several praying figures and references to God and Jesus. Text on the poster included the phrases "Prayer Changes Things," "Jesus Loves the Children," and "God Keeps His Promises." The phrase "the only way to save our world!" was prominently written in a child's hand. It is undisputed that religious topics were not part of the kindergarten environmental curriculum and that Mrs. Weichert had not taught the class that religious figures could (or could not) save the environment.

Appendix B

According to defendants, Mrs. Weichert and Principal Creme concluded that the poster submitted by Antonio was not responsive to the poster assignment. Further, they were concerned that display of the poster at the environmental assembly could convey the false impression that its religious message was being taught in kindergarten classes at the school. They also thought the poster had been created with images and words selected by a person other than Antonio.

Plaintiff disputes these assertions, stating that the work on the poster was solely Antonio's work. Mrs. Peck testified that when she received the instructions concerning the poster project, she sat down with Antonio, read the letter to him and told him the school wanted him to do a poster on how to save the environment. Mrs. Peck stated that Antonio responded by saying that the only way to save the world was through Jesus. She stated that she then got out paper, markers, crayons and some magazines, that Antonio cut out pictures, and that she helped him arrange them on the paper but did not help him select the pictures to be included on the poster. She stated that, because Antonio could not read, she wrote down for him what he wanted to write on the poster and Antonio copied on the poster the words, "the only way to save our world!"

It is undisputed that, after conferring with Principal Creme, Mrs. Weichert asked Mrs. Peck to have Antonio submit another poster and that Mrs. Peck agreed to do so. According to Mrs. Peck, Mrs. Weichert said she could not display Antonio's first poster because she thought she would "get in trouble" and she thought she could not legally display the poster "for religious reasons." Mrs. Peck also testified

that she contacted Principal Creme, who told her that the first poster would not be displayed at the environmental assembly, that Antonio could do a second poster which could have "a little bit of religious stuff" on it, but that it should also show things like recycling and picking up trash.

Antonio submitted a second poster. It bore an image of a church cut out of a coloring book and pasted in the center of the page. Two stick figures were drawn on the church cut-out, placing litter into trash bins. To the right of the church were pasted two additional cut-outs, one of two people placing items into a recycling bin and the other of a chain of people surrounding the earth. The left side of the poster contained a cut-out depiction of Jesus which was similar to or the same as the one that had been at the center of the first poster.

Mrs. Weichert and Principal Creme testified that they concluded that the Jesus figure was not responsive to the poster assignment, that its display could be mistaken for the school's endorsement of the religious message it conveyed, and that it probably did not reflect Antonio's own work. Mrs. Weichert also testified that as part of the poster assignment she gave each child an opportunity to explain his or her poster, that she gave Antonio an opportunity to explain his poster, and that he explained certain parts of the poster but did not explain the Jesus figure. Neither Mrs. Weichert nor Principal Creme asked Antonio to explain the Jesus figure, nor did they ask him whether its inclusion was his own work, nor did they attempt to contact Mrs. Peck to discuss the matter. Mrs. Weichert stated that although she did not teach about endangered species, she would not have concealed a manatee

because, unlike the Jesus figure, a manatee would not pose a risk that a parent might surmise that she was teaching religion.

Plaintiff avers that the work on the poster was solely Antonio's work. Mrs. Peck testified that the only assistance she gave was to help him arrange the pictures he had cut out and printed from the computer, and that Antonio selected all the pictures on the poster himself and cut them out himself from books and magazines given to him by his mother. Plaintiff states that Antonio has received religious instruction since infancy and is capable of incorporating his religion into his class assignments.

Principal Creme instructed Mrs. Weichert to display the second poster at the environmental assembly in such a way that the kneeling figure was "folded under" and not visible. This left about two-thirds or three-fourths of the poster still visible, including the entire church. Antonio's poster was, however, actually folded in half when it was hung up for the assembly by a parent volunteer, so that only the right half of the poster was displayed. The right side of the church, the crosses on the church, a hand-drawn figure in front of the church throwing trash in a bin, the cut-out of people recycling items, and the cut-out of the world surrounded by figures were visible. The left side of the church, one hand-drawn figure in front of the church throwing trash in a bin, and the cut-out figure of Jesus were not visible. Approximately 80 posters of various sizes and shapes were displayed at the assembly.

Appendix B

Principal Creme testified that on occasion parents objected to the teaching of Native American religious beliefs in the fourth grade unit on New York State history, but assented after he explained to them that it was taught from an historical perspective as "part of the history of the region that they happen to be living in" and that "we're not advocating any one type of belief." He did not, however, use the same approach with Antonio's poster, that is, he did not display the poster and then explain to the parents at the assembly that it was from Antonio's perspective and that the school was not advocating one type of belief over another by displaying it.

Plaintiff asserts that the poster was responsive to the assignment. Plaintiff further asserts that the reasons given for rejecting the first poster and concealing a portion of the second poster "were pretextual" and that "the real and true reason Defendants censored Antonio's poster was because it was religious and because of Defendants' animus towards religion."

Affidavits

The parties submitted affidavits on the previous motion. In her affidavit, Mrs. Weichert stated that in her opinion, the posters "appeared to contain both plaintiff's work and that of someone other than plaintiff." She further stated:

> Students at the kindergarten level are extremely impressionable. They cannot be relied on to distinguish between what I as a teacher endorse and urge them to learn and other information to

which they are exposed in the course of classroom instruction. . . .

Plaintiff's initial poster did not, in my judgment, comply with the assignment that I had given. None of the environmental lessons that I taught in class had any religious content. . . . [Plaintiff's] posters were submitted in a traditional classroom setting as part of an exercise that was designed to impart particular knowledge and skills to him and to his classmates based on the environmental conservation study unit. The academic exercise was also intended to impart specific information about the kindergarten curriculum to the larger audience of parents who were invited to view the posters, because the posters were to depict what the students had learned in the course of the unit on the environment. . . .

My decisions in each instance were not based on the apparent religious content, *per se*, of the posters. My concerns were purely educational. Each poster was not responsive to the assignment given, and, if displayed, would have tended to create a false impression of the District's educational practices and curriculum by implying that the District taught that religion or God would save the environment. That false impression would have led the public to believe that the District promotes one particular religion over another. . . .

Appendix B

Each poster might have confused highly impressionable kindergarten students who could have thought that praying was a teacher-endorsed correct answer to the question of how to save the environment, or a valid response to the assignment despite what had been taught in class. Were I to have displayed plaintiff's poster with its religious themes, it is quite likely that my impressionable students and perhaps even their parents would have understood the implied message of said poster to carry my approval and endorsement. . . .

I respectfully submit that I was in the best position to predict how students and their parents were likely to respond to plaintiff's posters and to determine the impact that those student and parental responses might have on my ability to continue as an effective kindergarten teacher. To preserve that effectiveness and prevent disruption and controversy, I concluded that it was appropriate to refuse to display a poster that might reasonably have been perceived to associate the District with a position other than a position of neutrality on religious matters. . . . The restrictions imposed on plaintiff with respect to the posters that he submitted were reasonably related to legitimate pedagogical concerns.

I judged plaintiff's posters by ordinary academic standards of substance and relevance in accordance with generally accepted pedagogical goals and concerns.

Appendix B

Mrs. Peck's affidavit contained material similar to that of the complaint, and also stated as follows:

> The display of the poster would not have caused controversy or disruption and would not have given the impression that the school was teaching religion. One has to understand the context in which the poster was to be displayed. The poster was displayed not in the classroom, but in the cafeteria. The poster was not displayed only with Antonio's kindergarten, but with several other kindergarten classes invited together to meet in the cafeteria. The poster was a small poster, as the Defendant concedes, and its display was only temporary, for a portion of one school day. This the Defendant also concedes. The poster was not one poster which all the students would view, but one of approximately eighty (80) posters placed on a wall where all the posters could be viewed at the same time. Within the context of one poster among many, and specifically with the poster containing Antonio Peck's crayon written signature, there is no way a reasonable observer, whether at kindergarten or adult level, would object, or would understand that the poster was an endorsement by the school of religion or that the class taught religion. In fact, the second poster contained no religious writing and did not specifically identify the kneeling figure as Jesus. The interpretation of the figure is obviously in the eyes of the beholder. The figure could easily have been Jesus, as it was to Antonio, or it could

have been some other figure in a robe. The figure could be praying, as it was to Antonio, or it could be the figure was pointing to the sky as part of the environment, as the clouds and the stars were pictured overhead. No reasonable observer could mistakenly understand that the school was endorsing or promoting religion or that the class taught religion. The poster was clearly and obviously that of a child and as such should have been displayed. The school did not remain neutral in this matter but targeted the poster solely because of its religious content and thereby showed hostility toward religion.

DISCUSSION

Defendants point out that on the appeal and in this motion plaintiff abandoned the issues of freedom of religious exercise and equal protection. The Court deems the issues abandoned and does not address them. Likewise, plaintiff has abandoned all arguments based on the first poster. Therefore, the Court considers only the issues surrounding the second poster, which was folded to conceal the Jesus figure when it was placed on display in the school cafeteria. Facts relative to the first poster are discussed where relevant to the remaining issues.

Appendix B

The Freedom of Speech Claim

Nature of the Forum

Freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered. *See Bronx Household of Faith v. Community Sch. Dist. No.* 10, 127 F.3d 207, 211 (2d Cir. 1997). The Supreme Court has identified three types of forums: the traditional public forum, the "limited" public forum and the nonpublic forum. *See Cornelius v. NAACP Legal Defense & Educ. Fund Inc.*, 473 U.S. 788, 802 (1985). A nonpublic forum is a government property that has not been opened for public speech either by tradition or by designation. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). In such a forum, the government may make a distinction in access on the basis of subject matter and speaker identity and "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* Thus, courts will uphold governmental restriction on speech in a nonpublic forum as long as the restriction is reasonable and viewpoint-neutral. *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) (citing *Perry Educ. Ass'n*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 800).

This Court reaffirms its determination on the previous motion that the school cafeteria facilities at issue here constituted a nonpublic forum as a matter of law, based on the following undisputed facts. The District did not open the

cafeteria facilities at the School for unregulated speech. Mrs. Weichert's kindergarten classroom and the cafeteria wall where the children's posters were exhibited were operated by the school exclusively for the purpose of elementary education. There is no claim that the School invited or permitted the public to the premises for expressive activity. The assembly occurred in connection with traditional educational activity supervised by faculty members. Accordingly, defendants' restriction on speech in that context need only be (1) reasonable and (2) viewpoint neutral.

Reasonableness

In addressing the reasonableness of restrictions imposed by public school authorities on student expression in a nonpublic forum, courts consider whether the student speech at issue is "tolerated" expression (also referred to as "private" expression) or "promoted" expression (also referred to as "school-sponsored" expression).

> The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public

> might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
>
> ---
>
> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (footnote omitted.). The *Hazelwood* court added that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

The environmental assembly was clearly a school-sponsored expressive activity under *Hazelwood.* Thus, defendants could properly exercise editorial control over the style and content of student expression at the assembly so long as their actions were reasonably related to legitimate pedagogical concerns.

Appendix B

Viewing the evidence most favorably to plaintiff, the Court finds that defendants have demonstrated that their actions were reasonably related to legitimate pedagogical concerns. The Court further finds that there are no material questions of fact on this issue. During her deposition Mrs. Weichert consistently testified that she folded the poster because it was not responsive to the assignment, because she doubted it was Antonio's work and because it contained religious images which could lead some parents to infer that she was teaching or endorsing religion in her classroom. Lengthy and intensive questioning by plaintiff's counsel during Mrs. Weichert's deposition did not uncover any countervailing evidence.

Similarly, Principal Creme testified that he agreed that the second poster should be folded because it was not responsive to the assignment, because he doubted that it was Antonio's work and because it contained religious images which could lead some parents to infer that Mrs. Weichert was teaching or endorsing religion in her classroom. Again, lengthy and intensive questioning on his deposition did not uncover any countervailing evidence.

Further, Superintendent Gilkey testified that he agreed with the concerns of Mrs. Weichert and Principal Creme that the poster might give parents the impression that the school was endorsing religion. His testimony on this point was consistent.

Plaintiff's brief identifies four "disputed facts": (1) whether the poster was responsive to the assignment; (2) whether the poster was Antonio's work; (3) whether

parents might reasonably perceive the religious content of the poster to bear the imprimatur of the school; and (4) whether the defendants' "real reason" for concealing the Jesus figure was hostility toward religion.[4] The Court now addresses the first three, which are relevant to the issue of reasonableness. The Court addresses the fourth "disputed fact" — whether the defendants' "real reason" for concealing

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4. In vacating the Rule 12(b)(6) dismissal in this case, the Second Circuit stated:

> While the defendants contend the rejection of the first poster and the folding of the second one were justified by legitimate pedagogical concerns, in that defendants argue the religious imagery was not responsive to the assignment to make a poster about the environment, we believe that the discovery to be taken by plaintiff is at least theoretically capable of affecting the result of the case. For example, plaintiff's discovery of the teacher or of the school principal (who apparently shared in the decision not to post plaintiff's first poster and to fold the second) might reveal that they took these actions because of animus or hostility toward Christianity or toward religion generally. If the evidence, construed in the light most favorable to plaintiff, were to demonstrate such motivating animus or hostility, the case would be very different from a motivation stemming from a legitimate pedagogical concern, such as the responsiveness of the poster to the assignment. In addition, defendants' contention that the poster was not responsive to the assignment would be better assessed after further discovery regarding the exact nature of the assignment.

Peck v. Baldwinsville Cent. School Dist., 7 Fed.Appx. 74, 75-76, 2001 WL 303755,*2 (2d Cir. 2001).

the Jesus figure was hostility toward religion — in its discussion of plaintiff's Establishment Clause claim, *infra*.

First, plaintiff urges that there is a question of material fact regarding whether the poster was responsive to the assignment. However this is not the proper inquiry. Rather, the proper inquiry is whether it was reasonable for Mrs. Weichert to conclude that the poster was not responsive to the assignment. In her testimony, Mrs. Weichert described the environmental topics the class had covered throughout the year and in the intensive two-month long environmental unit. It is undisputed that the environmental lessons focused on simple ways to conserve natural resources and save the environment, such as preserving trees and animals, using water and other natural resources sparingly and wisely, and keeping the environment clean. Mrs. Weichert testified that she assigned the posters to give children the opportunity to demonstrate what they had learned in the unit, that she had discussed the project many times in class, and that she had verbally instructed the children many times that their posters should reflect what they had been learning in class. She testified that the few homework assignments that she had given throughout the year had always pertained to what the children had learned in class and that she expected that parents would understand that the project was intended to reflect what they had learned. She further testified generally about how she would evaluate and handle various issues regarding nonresponsive work. Her conclusion regarding the nonresponsiveness of Antonio's religious imagery is bolstered by Principal Creme's testimony that as a kindergarten student, Antonio could not likely formulate the abstract concept that Jesus could save the environment.

Appendix B

Mrs. Weichert's conclusion that the religious imagery was not responsive to the assignment was reasonable and well within her authority and discretion as a teacher.

Plaintiff adduces no evidence which would support a finding that Mrs. Weichert's conclusion of nonresponsiveness was unreasonable. Plaintiff has had full discovery on the nature of the assignment and has still produced no evidence that the assignment was so broad that it was unreasonable for Mrs. Weichert to conclude that the Jesus figure was nonresponsive. The fact that the letters sent home to parents about the assignment did not expressly limit the poster assignment to matters covered in the classroom does not present a material question of fact on the issue of responsiveness; there is no reason to expect that the letters would set forth every element of the assignment. Despite extensive questioning, plaintiff's counsel did not elicit any evidence creating a question of fact on this issue.

Second, plaintiff urges that there is a question of material fact regarding whether the religious imagery on the poster reflected Antonio's work. Plaintiff relies on evidence that the poster was in fact Antonio's work, that the content reflected his ideas and that the only assistance Mrs. Peck gave was to help him arrange the pictures he had cut out and printed from the computer.

The proper inquiry on this issue is whether it was reasonable for defendants to conclude that the poster did not reflect Antonio's ideas and work. During her deposition Mrs. Weichert stated that she believed the poster contained images that were most likely selected by someone other than

Appendix B

Antonio, based on the facts that at the time he submitted the poster he was six years old, could neither read nor write, and was not yet a "higher level thinker." Principal Creme testified to this issue extensively, particularly with respect to the capability of Antonio or any kindergarten student to formulate abstract concepts such as the concept that Jesus could save the environment. Both Mrs. Weichert and Principal Creme also noted that when given the opportunity to explain the second poster, Antonio explained some images but not the Jesus figure.

There is nothing in the record to suggest that the concerns of these two experienced educators on this question were not reasonable. Evidence to the effect that the poster was actually Antonio's work and that in fact they might have been mistaken does not create a question of fact regarding the reasonableness of their conclusions. *See Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995) (finding no question of fact where teacher's reasons for refusing to accept a research paper on the life of Jesus were reasonable even if mistaken).

Third, plaintiff urges that there is a question of material fact regarding whether parents might reasonably perceive the religious content of the poster to bear the imprimatur of the school. It is undisputed that the students presented the environmental assembly after studying the environment all year, concluding with an intensive two-month unit on the environment. Obviously, given the young ages of the children, virtually all preparation for the assembly except the creation of the posters had taken place at school, and the teachers had selected all of the elements of the assembly such as songs

and decorations. The letters sent to the parents stated that the children were spending a great deal of classroom time preparing for the environmental assembly, that they were to make environmental posters at home in order to enhance their understanding of the environment and that the posters would be displayed at the assembly. Although the letters to the parents did not explicitly limit the content of the posters to what had been taught in class, it is nevertheless reasonable to expect that most children's posters would relate to material taught in class. The record evidence demonstrates as a matter of law that under all of the circumstances it was reasonable for defendants to believe that the display at the assembly of a poster with religious content could be perceived as reflecting what was taught in class or otherwise bearing the imprimatur of the school. Mrs. Peck's opinion to the contrary does not create a question of fact.

Accordingly, defendants have demonstrated as a matter of law that defendants' conduct was reasonably related to legitimate pedagogical concerns. This conclusion is consistent with the well-established principle that the education of the nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. *See generally Epperson v. Arkansas,* 393 U.S. 97, 104 (1968).

Viewpoint Neutrality

Turning to the second *Perry* factor, the Court observes that, while the government may reasonably restrict expressive activity in a nonpublic forum on the basis of content, it may not do so on the basis of the speaker's viewpoint. "[S]peech

discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); *accord Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

In determining the scope of permissible subjects for the poster assignment, the Court relies on record evidence that the posters were intended to be the culmination of the environmental unit Mrs. Weichert had been teaching throughout the year and most intensively for the past two months. Mrs. Weichert instructed the children that the posters should reflect what they had learned in class. The subject for the posters was, in Mrs. Weichert's words, "ways to save our environment, *i.e.*, pictures of the earth, water, recycling, trash, trees etc."; these are the topics covered in class. The purpose of the poster assignment was to reinforce and extend the concepts covered in class. Mrs. Weichert testified that she would have accepted a poster with imagery that was not taught in class provided that it "related to" what she had taught in class. There is no evidence to the contrary. Thus, the subject of the permissible speech in the posters was the environmental material covered in class and related material.

The subject of permissible speech here, *i.e.*, the environmental material covered in class and related material, cannot reasonably be addressed by a picture of Jesus. Thus, the picture of Jesus was not speech pertaining to an otherwise permissible subject. Accordingly, defendants' conduct in concealing the picture of Jesus did not constitute viewpoint

discrimination.[5] Indeed, by leaving visible the children picking up trash in front of the church, Mrs. Weichert and Principal Creme accepted those religious references which were related to the environmental material covered in class, that is, which were within the scope of permissible speech.

This case is distinguishable from *Lamb's Chapel* and *Good News Club*, relied on by plaintiff, because in those cases, speech discussing otherwise permissible subjects was excluded on the ground that the subject was discussed from a religious viewpoint. For example, in *Good News Club*, the court found viewpoint discrimination where the school made its premises available to clubs teaching children moral values, but excluded a Christian club because it sought to teach children moral values from a religious standpoint. And in *Lamb's Chapel*, the court found viewpoint discrimination where the school permitted the use of its premises for programs teaching family values, but excluded a church film series because it taught family values from a Christian perspective. In contrast, here, the picture of Jesus on Antonio's poster cannot reasonably be characterized as speech on a permissible subject, that is, on the subject of the environmental material taught in class and related material.

Plaintiff attempts to characterize the subject of the poster assignment as a broad open-ended discussion of "how to save the earth" or "how to save the environment." If this were the subject, exclusion of a religious response might well

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5. As noted, it is uncontradicted that Mrs. Weichert and Principal Creme folded the poster so as to conceal only the Jesus figure; apparently the parent volunteer who actually hung the poster folded it in half, thus also concealing part of the church.

constitute viewpoint-discrimination. The conclusion that this was not the subject of the assignment is supported by a number of factors, including the nature of the assembly at which the posters were displayed and the examples set forth in the letters to the parents, such as water and recycling. It is also supported by the testimony of Principal Creme regarding the intellectual capabilities of kindergarten children in general, and by the testimony of Mrs. Weichert that given the ages of the children she did not give broad general assignments. Further, Mrs. Weichert stated that she repeatedly instructed the children that their posters should reflect what was taught in class. The limited nature of the subject of the poster assignment is also apparent from the lack of evidence that any other poster contained material that departed significantly from the assignment or that addressed the environment from any viewpoint other than that taught in class.[6]

Defendants' position that religious imagery was outside the limited scope of speech permitted in the poster assignment is consistent with their position on religious imagery in other contexts. For example, Principal Creme testified that a report about Jesus was a permissible response to an assignment to write a report about an historical figure; that it was appropriate to cover Native American religious traditions when teaching New York State history; and that when teaching about the holidays, the teachers discussed

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6. Plaintiff claims that one poster was in the shape of a heart and another depicted a person; this falls far short of evidence that the topic was sufficiently open-ended to encompass Antonio's religious imagery or that Mrs. Weichert accepted material that departed significantly from the topic.

Christmas, Hanukkah and Kwanza. Similarly, Superintendent Gilkey stated that teaching about religions is permissible if it does not focus on a particular religion but rather on "the role of religion in today's society," and that posters reflecting various religions would be appropriate in that context. He further stated that a report and poster on Jesus is an acceptable response to an assignment to do a report and poster about an historical figure, and that a holiday concert with religious songs is appropriate provided that "there was a balance of variety and . . . it didn't focus upon a particular religion." Thus, defendants' policy is that religious imagery is permissible provided that it is within the scope of the particular assignment.

Plaintiff also points to Mrs. Weichert's testimony to the effect that if she had received a poster with nonresponsive material which was not religious in nature she would not necessarily have concealed the nonresponsive portion. Her acknowledgment that she acted partly out of concern that parents would infer that she was teaching religion in class does not, however, establish viewpoint discrimination. This Court has already found that defendants have demonstrated the reasonableness of their concern that parents viewing the poster might perceive that religion was being taught in the classroom. Obviously, a poster with a neutral nonresponsive element such as a fish or a shoe would not pose the same risk. An educator's acknowledgment of a potential Establishment Clause concern is not viewpoint discrimination.

Moreover, defendants' evidence indicated that, given the nature of the assignment and the assembly, they would be

concerned about a poster incorporating material on any topic which is not appropriate for school involvement. For example, Superintendent Gilkey testified that he would be concerned about a poster bearing a logo of an environmental or conservation group because, if the group were a commercial enterprise, the poster might be interpreted as the school's endorsement of a commercial enterprise. Presumably a poster indicating that in order to save the environment one should vote for a certain political candidate would also raise concerns.

Viewed in the light most favorable to plaintiff, the record evidence establishes viewpoint-neutrality as a matter of law. Plaintiff raises no material questions of fact. Accordingly, the Court concludes as a matter of law that defendants' conduct did not deprive plaintiff of his First Amendment rights to freedom of expression.

Establishment Clause

Plaintiff contends that discovery has revealed evidence that defendants' conduct violates the Establishment Clause. Specifically, plaintiff relies on the testimony of Principal Creme that on occasion parents have objected to the teaching about Native American religious beliefs in the fourth grade unit on New York State history, but have assented after he explained to them that it is taught from an historical perspective as "part of the history of the region that they happen to be living in" and that "we're not advocating any one type of belief." Plaintiff points out that, in contrast, Principal Creme simply suppressed Antonio's speech and did not explain to parents in the environmental assembly that

Antonio's poster was from Antonio's perspective and that the school was not advocating one type of belief. Plaintiff urges that defendants treated Native American religion more favorably than the Christian religion and that "this facial preference for one religion over another violates the Establishment Clause."

A governmental practice which touches on religion does not offend the Establishment Clause if (1) it has a secular purpose, (2) it neither advances nor inhibits religion, and (3) it does not create an excessive entanglement of government with religion. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

In considering the first prong of the test — whether the government's regulation serves a secular purpose — courts consider whether the government is legislating in such a way as to abandon neutrality and to promote a particular religious point of view. *See Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 335 (1987). Here, this Court has already concluded that defendants' conduct with respect to Antonio's poster was viewpoint-neutral and reasonably related to legitimate pedagogical concerns. For the same reasons, defendants' conduct serves a secular educational purpose.

To satisfy the second prong of the *Lemon* test, the government is required to show that (1) it did not act with the purpose of advancing or inhibiting religion; and (2) the action does not have the effect of advancing or inhibiting religion. *See Agostini v. Felton,* 521 U.S. 203, 222-23 (1997). In this respect, the government's conduct must not evince a preference for "those who believe in no religion over those

who do believe," *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 225 (1963), or convey a message of government disapproval of religion or hostility toward religion. *See Bronx Household of Faith,* 127 F.3d at 216.

Regarding this prong of the *Lemon* test, plaintiff argues that defendants' actions evinced a preference for those who believe in no religion over those who do believe. He further argues that defendants' conduct had the purpose of advancing one religion over another. And he argues that the reasons given by Mrs. Weichert and Principal Creme for their actions were pretextual and that the "real reason" for their conduct was hostility to religion or Christianity.

First, plaintiff argues that by rejecting a religious response to the poster assignment, defendants evinced a preference for those who believe in no religion over those who do believe, thus promoting a "religion of secularism." *Abington Township,* 374 U.S. at 225. This argument has no support in the record. The Court has already found as a matter of law that defendants' conduct regarding the poster was based on legitimate pedagogical concerns and was viewpoint-neutral. In other words, defendants' exercise of their judgment as experienced educators was neutral; it neither favored nor opposed religion.

Plaintiff also argues that defendants' conduct had the purpose of advancing one religion while inhibiting another. Plaintiff points to the fact that defendants taught about Native American religion in a fourth grade unit on New York State history. That defendants rejected a picture of Jesus in response to an environmental assignment but taught about

Appendix B

Native American religion in an historical context is not evidence of favoring one religion over another. Rather, it is evidence that defendants properly presented religious material when it was within the scope of the subject matter being taught and rejected it when it was not.[7]

Further, with respect to the second *Lemon* prong, plaintiff claims that there is a question of fact regarding the "real reason" for concealing the religious imagery on the poster. Plaintiff argues that the reasons given by Mrs. Weichert and Principal Creme are pretextual and that the "real reason" for their conduct was hostility toward religion. The testimony of Mrs. Weichert, Principal Creme and Superintendent Gilkey concerning their reasons for their conduct was consistent and uncontradicted. The Court has already concluded that defendants' conduct regarding the poster was based on legitimate pedagogical concerns and was viewpoint-neutral. Defendants have demonstrated as a matter of law that their conduct was motivated by their judgment as experienced educators that the poster was nonresponsive, may not have been Antonio's work and may have given the parents the impression that religion was taught in the classroom. Their motivation was neutral towards religion in all respects and evinced no hostility toward religion or Christianity.

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7. It is well established that, while public schools may not adopt programs or practices which aid or oppose any religion, "study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition[.]" *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *accord Abington Township*, 374 U.S. at 225 ("[S]tudy of the Bible or of religion, when presented objectively as part of a secular program of education, may [] be effected consistently with the First Amendment.").

Appendix B

Plaintiff has produced no evidence raising a question of fact regarding the real reason for defendants' actions, despite extensive questioning of Mrs. Weichert, Principal Creme and Superintendent Gilkey on this subject during the depositions. In claiming that the reasons given were pretextual, plaintiff points to the testimony of Mrs. Weichert that if she had received a poster with nonresponsive material which was not religious in nature she would not necessarily have concealed the nonresponsive portion.[8] Her acknowledgment that she acted partly out of concern that parents would infer that she was teaching religion in class does not, however, raise a question of fact on the issue of hostility towards religion or Christianity.

Finally, the Court finds that defendants' conduct here did not entangle the government with religion. To determine whether the entanglement is excessive, a court "must examine the character and purposes in the institutions that are benefitted" and evaluate the resulting relationship between the government and religious authority. *Lemon*, 403 U.S. at 615. There is no merit to plaintiffs' contention (rejected on the previous motion) that entanglement arises from the teacher's continuous monitoring of students' work to eliminate religious content. Nor is there any other basis for a finding of entanglement.

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8. Plaintiff also isolates one statement by Mrs. Weichert to the effect that if Antonio had included anything religious on the poster she would not have accepted it even if it dealt with saving the environment. This statement was made in response to confusing hypothetical questioning regarding what imagery she would or would not accept. Read in context, her testimony was consistent and reflected no purpose to inhibit religion or Christianity.

Accordingly, construing the evidence in the light most favorable to plaintiff, the Court concludes that defendants have demonstrated as a matter of law that their conduct did not violate the Establishment Clause. Despite full discovery, plaintiff has not shown the existence of a material question of fact on this issue.

CONCLUSION

In reversing the prior dismissal of this action, the Second Circuit explicitly stated:

> We do not suggest by this ruling, as plaintiff argues, that regardless of the evidence, the case is not amenable to summary judgment. If after full opportunity for discovery, the evidence viewed in the light most favorable to plaintiff shows that there is "no genuine issue as to any material fact and that the [defendants are] entitled to judgment as a matter of law," Fed.R.Civ.P. 56(c), we see no reason why summary judgment should not be granted.

Peck, 7 Fed. Appx. at 76; 2001 WL 303755 at 2.

As it did on the first motion, the Court finds that defendants have demonstrated that there is no genuine issue as to any material question of fact and that they are entitled to judgment. After full discovery, plaintiff has uncovered no questions of fact on the issues identified by the Second Circuit, *i.e.*, whether defendants acted out of animus or hostility toward Christianity or religion and whether the

poster was responsive to the assignment. Nor has plaintiff demonstrated the existence of any other question of fact. Plaintiff's opposition to summary judgment amounts to no more than speculation and conjecture.

In arguing that summary judgment should be denied, plaintiff relies on the general principle that questions such as intent and motivation are not readily susceptible to summary judgment. Here, the testimony of Mrs. Weichert, Principal Creme and Superintendent Gilkey was consistent and fully supported defendants' position. There is no basis in the record to challenge their credibility. Nor do the circumstances in themselves give rise to any inference of improper motivation. It is true that where a person's intent and state of mind are implicated, summary judgment is not ordinarily appropriate; that is not to say, however, that it is never warranted. As the Second Circuit has observed, "[t]he summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). Where, as here, the uncontroverted evidence establishes permissible motivation, and there is no evidence to suggest impermissible motivation, the salutary purposes of summary judgment are well-served by dismissal.

It is therefore

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that the action is dismissed in its entirety.

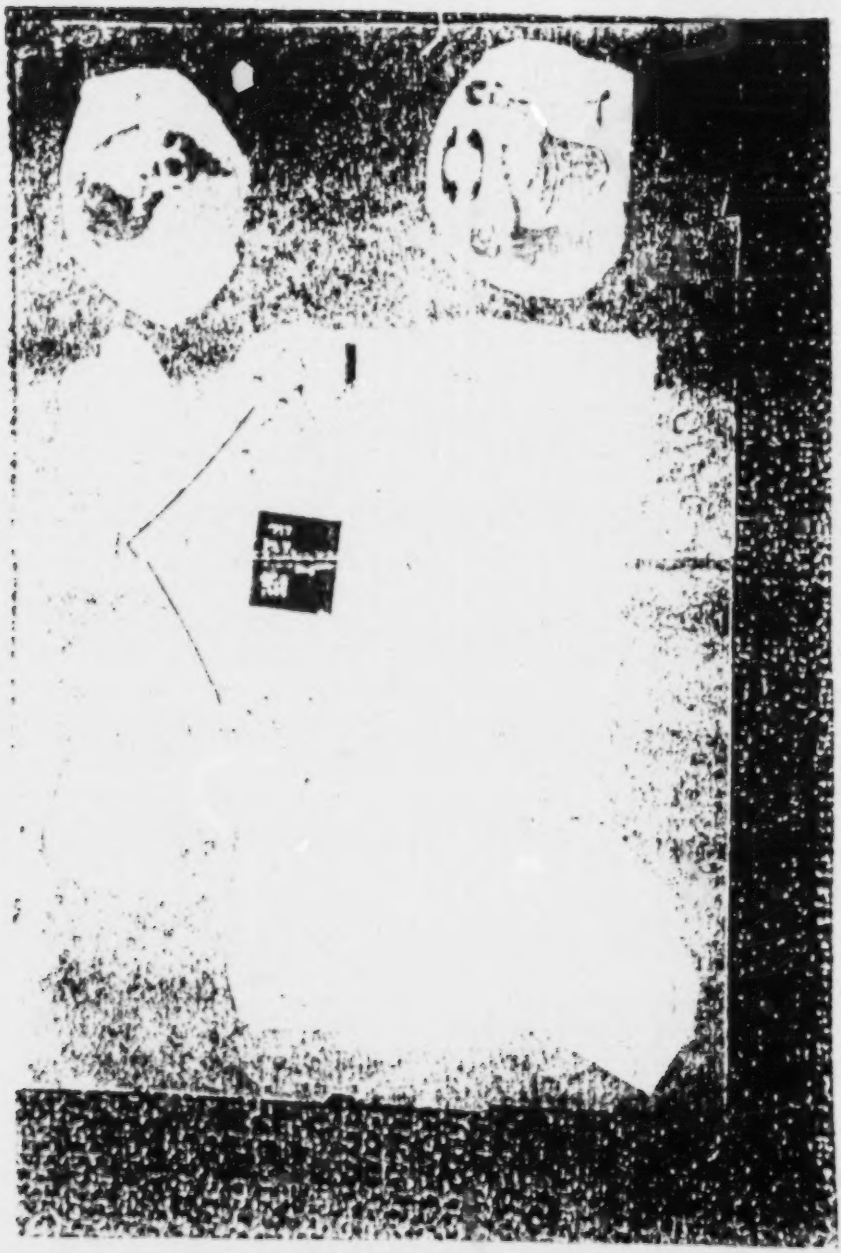
IT IS SO ORDERED.

August 16, 2004
Syracuse, New York

s/ Norman A. Mordue
Norman A. Mordue
U.S. District Judge

APPENDIX C — ANTONIO PECK'S POSTERS

Appendix C



Appendix C

(2)

No. 05-899

IN THE

Supreme Court of the United States

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE MCNAMARA ELEMENTARY SCHOOL, ROBERT CREME, individually and in his official capacity as principal of Catherine McNamara Elementary School, and THEODORE GILKEY, individually and in his official capacity as Superintendent for Baldwinsville School Board of Education,

Petitioners,

v.

ANTONIO PECK, a minor by and through his parents and next friends, JOANNE PECK and KENLEY LESTER PECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public school violated a student's constitutional right to freedom of speech by censoring the religious viewpoint of a student's poster on an otherwise includable subject submitted in response to a class assignment.

2. Whether the Establishment Clause constitutes a compelling interest sufficient to justify a viewpoint-based restriction of a student's religious expression on a permissible subject matter in a poster drawing that was displayed on a school cafeteria wall with numerous other posters for a limited period of time.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases **Page(s)**

Rules

STATEMENT OF THE CASE

This case is about Antonio Peck, a Kindergarten student during the 1999-2000 school year at Catherine McNamara Elementary School in the Baldwinsville Central School District. App. 3a. In 1999, Susan Weichert, Antonio's kindergarten teacher, gave her class an assignment to draw a poster. *Id.* The assignment was to be done at home with the assistance of the parents. *Id.* In order to explain the assignment to the parents, Ms. Weichert sent home a letter with each of the children explaining the assignment. *Id.* The letter stated as follows:

> To enhance the student's understanding of his environment, we are asking students to make an environmental poster at home and bring it to school on June 4th. These posters will be on display at our Program. The children may use pictures or words, drawn or cut out of magazines or computer drawn by the children depicting ways to save our environment, i.e. pictures of the Earth, water, recycling, trash, trees, etc. This should be done by the student with your assistance. The poster should be able to fit into the child's backpack. We hope this project will be fun for all!

App. 5a. Shortly thereafter, Ms. Weichert sent home another letter to the parents that stated as follows:

> Also a reminder that each student should be working on his environmental poster to be hung up at the Program. Ideas should involve ways to save Earth and it should be the child's work. Pictures drawn, cut out of magazines, or computer drawn are all great ideas.

Id. The assignment was given to all four kindergarten classes at the elementary school. App. 4a. The classes all put on an

environmental assembly where the students planted a tree and sang environmentally-themed songs. *Id.* Parents were invited to the assembly. *Id.* The posters of all the kindergarten students - approximately 80 students - were to be displayed at the environmental assembly on the walls of the cafeteria. *Id.*

Antonio's mother, JoAnne, sat down with Antonio one night after receiving the instructions to assist Antonio in completing his poster. *Id.* JoAnne read the letter to Antonio and told him that the school wanted him to do a poster on how to save the environment. App. 6a. Antonio responded by saying that the only way to save the world was through Jesus. *Id.* JoAnne then got out paper, markers, crayons and some magazines and Antonio cut out pictures which JoAnne helped him arrange on the paper. *Id.* JoAnne did not help Antonio select the pictures to be included on the poster. *See* Deposition of Joanne Peck ("Joanne Peck Depo.") at 12. Because Antonio could not read, Antonio told his mother what he wanted the poster to say, and then copied the words that JoAnne wrote down for him. App. 6a. Antonio copied on the poster the words, "The only way to save our world." *Id.*; App. 74a. The first poster included, among other things, pictures of a figure praying, two children on a rock with the word "Savior", the Ten Commandments, and an illustration regarding the Fruit of the Spirit. *Id.*; App. 74a.[1]

Antonio took the poster to school and turned it in to Ms. Weichert. App. 6a. Upon receiving the poster, Ms. Weichert took it to Principal Creme to review. *Id.* Principal Creme told Ms. Weichert to have Antonio do another poster. *Id.* Superintendent Gilkey agreed with Principal Creme's

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[1] Plaintiff believes that the Defendants' censorship of the first poster was unconstitutional, but has chosen to focus this litigation on the second poster and the censorship of the second poster.

decision. *Id.* Principal Creme's decision was based on three factors. *See* Deposition of Robert Creme ("Creme Depo.") at 13-15. The first was that he felt as if the poster had no relevance or relationship to the assignment. *Id.* Principal Creme also testified that he was "quite certain" the poster was not Antonio's work and also that the poster did not demonstrate that Antonio had learned anything in class.

Ms. Weichert approached JoAnne Peck at an art show the school was having and told her that she could not hang Antonio's first poster because she thought she would get in trouble and legally she thought she could not hang the poster because of its religious theme. App. 6a-7a. JoAnne contacted Principal Creme and asked him whether the poster would be hung at the environmental program. *See* Joanne Peck Depo. at 28-29. Principal Creme stated that it would not but that Antonio could do a second poster and that it could have a little bit of religious "stuff" on it and even suggested showing pictures of recycling, kids holding hands around the world and other things that he would accept. *Id.*

JoAnne sat down again with Antonio to help him do a second poster. App. 7a. The only assistance JoAnne gave Antonio was to help him arrange the pictures he had cut out and printed off the computer. *See* Joanne Peck Depo. at 34. Antonio selected all the pictures on the poster himself and cut them out himself out of books and magazines given to him by JoAnne. *Id*; *see also* Deposition of Antonio Peck ("Antonio Peck Depo.") at 6. Antonio also wrote his name on the second poster. *See* Antonio Peck Depo. at 6. The second poster depicted children picking up trash and dumping trash in a trash can, adults putting recycled trash into a trash can, cut outs of children holding hands circling the globe, clouds, trees, a squirrel, and grass, all depicted in front of a church with a figure on the left kneeling with two hands outstretched

toward the sky. App. 75a.

After receiving the second poster, Ms. Weichert immediately took the poster to Principal Creme who told her that there were portions of the poster that clearly showed an understanding of the environmental unit taught in class, but that the picture of the robed figure did not relate to what had been taught in class and that should be folded under so as not to be displayed when it was hung on the wall. *Id.* Principal Creme made the decision to fold the poster so that the robed figure was not visible because he assumed the picture was of Jesus and that because it was religious it would mislead other parents and students at the environmental assembly to assume that religion was taught in the classroom. *See* Creme Depo. at 15. Principal Creme also did not believe the robed figure was responsive to the assignment and did not believe that it was Antonio's own work. *Id.*

As part of the class assignment on the posters, each child was given an opportunity to explain their poster. App. 8a. Ms. Weichert gave Antonio an opportunity to explain his poster in front of the kindergarten class. *Id.* Antonio only explained certain parts of the poster but did not explain the robed figure on the poster. *Id.* However, neither Ms. Weichert nor Principal Creme asked Antonio at any time to explain the robed figure on the poster. *Id.* Neither Ms. Weichert nor Principal Creme asked Antonio whether the inclusion of the robed figure on the poster was Antonio's work. *Id.* Additionally, neither Ms. Weichert nor Principal Creme attempted to contact JoAnne to discuss with her their concerns about Antonio's second poster. *See* Joanne Peck Depo. at 40.

JoAnne Peck assumed that everything was fine until she got to the environmental assembly program and noticed that Antonio's poster was folded in half so that half of the church

and people picking up trash were obscured as well as the robed figure. *See* Joanne Peck Depo. at 41-48; App. 76a; *see also* Appendix to Response to Pet. at 1a. Mrs Weichert was told by Principal Creme to hang the poster on the wall with only the robed figure obscured, but the poster was hung folded in half, obscuring more than just the robed figure. App. 8a, 76a; Appendix to Response to Pet. at 1a. Despite the fact that the second poster was clearly within the environmental thrust of the program, Ms. Weichert folded Plaintiff's poster in half, thereby censoring out the religious figure (Jesus) on the left side of the poster and half of the rest of the poster (cutting the church in half and making it indistinguishable), and hung it on the wall folded in half. *Id.* The folding of the poster was intended to censor out any religious reference in the poster and made the poster look silly as it was only a fraction of the size of the rest of the approximately 80 other posters. *Id.*; *see also* App. to Response to Pet. at 1a. Further, the poster looked silly because it was folded in half, thereby cutting Antonio Peck's name in half. *Id.* Indeed, Antonio's name when the poster was folded read, "tonio Peck" thereby causing every observer who saw the poster so folded to clearly understand that it had been folded so as to censor the hidden half of the poster.

Ms. Weichert testified that if Antonio had included a different picture, other than a religious picture, that was not responsive to the assignment, she would have displayed that. *See* Deposition of Susan Weichert ("Weichert Depo.") at 78, 92-96. For instance, Ms. Weichert testified that had Antonio included a picture of a Manatee on the poster instead of the robed figure, that she would display the poster in its entirety even though the manatee was not discussed in class. *Id.* She testified that she would do so because the manatee picture would have no religious significance and therefore she would

not have to worry about others assuming that she was teaching religion in the classroom. *Id.* Ms. Weichert also testified that if Antonio had included anything religious on the poster she would not have accepted it even if it dealt with saving the environment because she did not teach about religion in class. *Id.* at 136. Ms. Weichert testified this way even though she also admitted that persons viewing the poster would think it was created by Antonio and not by the school. *Id* at 140.

On November 1, 1999, Plaintiff filed a Complaint in the United States District Court for the Northern District of New York, Syracuse Division, alleging that Defendants' conduct violated Plaintiffs' right to free speech, freedom of religion, equal protection and that Defendants' actions violated the Establishment Clause of the First Amendment to the United States Constitution. App. 39a. The Defendants filed a Motion to Dismiss the Complaint. On February 2, 2000, a hearing was held before the Honorable Judge Norman A. Mordue on Defendants' Motion to Dismiss the Complaint. *See Peck v. Baldwinsville School Bd. of Educ.*, 7 Fed.Appx. 74, 2001 WL 303755 (2d Cir. 2001). In an order dated February 15, 2000, the District Court, with no notice to the Plaintiffs, converted the Defendants' Motion to Dismiss to a Motion for Summary Judgment and granted final judgment to the Defendants. *Id.* The Second Circuit unanimously reversed the District Court's grant of summary judgment to the Defendants and remanded the case for discovery stating that the conversion of the Motion to Dismiss to a Motion for Summary Judgment without notice to the Plaintiff surprised and prejudiced the Plaintiff. *Id.*

After remand, Plaintiff engaged in discovery, taking the depositions of Ms. Weichert, Principal Creme and Superintendent Gilkey. Defendants also took the depositions

of Antonio, Jo Anne and Kenley Peck. Defendants filed a Motion for Summary Judgment which was granted by the District Court.

Plaintiff appealed to the Second Circuit Court of Appeals a second time. In a unanimous opinion, the Second Circuit Court of Appeals remanded the case for trial on the issue whether the school district engaged in viewpoint discrimination. The Court of Appeals first found that the forum at issue, both Antonio's classroom and the school cafeteria, were non-public fora. App. 17a. The court then found that Antonio's poster was governed by this Court's opinion in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), as opposed to the more rigorous student speech standard this Court announced in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), because the poster was prepared pursuant to a class assignment to reflect what had been taught in the classroom. App. 21a-23a.

In applying the *Hazelwood* standard of whether the school's censorship of Antonio's poster was reasonably related to a legitimate pedagogical interest, the Court of Appeals stated that, "In our judgment, however, the district court overlooked evidence that, if construed in the light most favorable to Pecks, suggested that Antonio's poster was censored *not* because it was unresponsive to the assignment, and not because Weichert and Creme believed that JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment." App. 26a. The Court then held that if sufficient facts were proven, "The District's actions might well amount to viewpoint discrimination." App. 28a.

The Court of Appeals then turned to the question whether *Hazelwood* prohibits viewpoint discrimination.

Acknowledging that the Circuit Courts are in conflict on this point, the Court held that, "[A] manifestly viewpoint discriminatory restriction on school-sponsored speech is prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." App. 31a.

The Court of Appeals also stated it may be possible "that certain aspects of the record might be developed in such a manner as to disclose a state interest so overriding as to justify, under the First Amendment, The District's potentially viewpoint discriminatory censorship." App. 32a. The Court then mentioned the District's argument that allowing Antonio's poster would constitute an endorsement of religion as potentially presenting such an overriding interest, but left the issue of "whether The District's actions were necessary to avoid an Establishment Clause violation," for the District Court to determine in the first instance. App. 32a-33a.

The Court of Appeals, after affirming the District Court's decision granting summary judgment to the District on the Establishment Clause claim, remanded the case to the District Court for further proceedings. App. 36a. The Defendants then filed their Petition for a Writ of Certiorari.

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION IS IN COMPLETE HARMONY WITH THIS COURT'S FREE SPEECH PRECEDENT.

The Second Circuit's decision in this case that viewpoint discrimination is impermissible even under the standard announced by this Court in *Hazelwood School District v.*

Kuhlmeier, is in accord with not only the *Hazelwood* decision, but also other free speech precedent from this Court. Thus, there is no reason for this Court to grant the requested writ.

Respondent does acknowledge that the Circuit Courts of Appeal are split on the issue whether viewpoint discrimination is permissible under *Hazelwood*. The First and Tenth Circuits have expressly held that viewpoint-based restrictions on school-sponsored speech are permissible. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002). While the Ninth and Eleventh Circuits have decided that viewpoint discrimination is impermissible under *Hazelwood*. *See Planned Parenthood of S. Nevada, Inc. v. Clark Cty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991 (en banc); *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989).

The Third Circuit initially stated in a panel opinion that viewpoint discrimination under *Hazelwood* was permissible, but the en banc court of the Third Circuit was equally divided on that question. *See C.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc* 226 F.3d 198 (3d Cir. 2000).[2]

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[2] The *Oliva* case involved a student's poster of a picture of Jesus submitted in response to a class assignment to draw a poster about what the student was thankful for. *See Oliva*, 226 F.3d at 201. Zachary's poster was placed on the wall in a prominent location, was removed for a time by unnamed School Board employees, and was placed back on the wall by his teacher in a less prominent location. *See id.* Respondents agree with Justice Alito's dissent in *Oliva* which stated:

I would hold that discriminatory treatment of the poster

Even though the Circuit Courts are in disagreement on the issue whether viewpoint-based discrimination is acceptable under *Hazelwood*, the Second Circuit's opinion in this case was in complete harmony with this Court's decisions both in *Hazelwood* and in established free speech precedent.

A. The Second Circuit's Decision Is In Harmony With This Court's Decision In *Hazelwood*.

The Second Circuit undertook a searching inquiry of this Court's decision in *Hazelwood* and correctly concluded that it could not depart from this Court's clear precedent that viewpoint discrimination is unacceptable under the First Amendment. App. 31a.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a principal had censored two articles drafted by students for the school newspaper. *Id.* at 263-64. The newspaper was written and edited by the Journalism II class at the high school and the Board of Education funded the printing costs of the newspaper. *Id.* at 262. The Journalism teacher would provide the articles to the principal prior to

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> because of its "religious theme" would violate the First Amendment. Specifically, I would hold that public school students have a right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. This conclusion follows from the following two principles: first, even in a "closed forum," governmental "viewpoint discrimination" must satisfy strict scrutiny and, second, disfavoring speech because of its religious nature is viewpoint discrimination.

Oliva, 226 F.3d at 210 (Alito, J., dissenting).

publication for review. *Id.* at 263. In reviewing the articles, one which was about the experience of three girls at the school with teen pregnancy and the other about the impact of divorce on students at the school, the principal was concerned that the girls mentioned in the pregnancy article might be identified from the text and that the subject of sexuality was inappropriate for the school paper. *Id.* The principal was also concerned that the student identified in the divorce piece had made personal comments about her parents that the parents should have consented to or had the opportunity to respond to. *Id.* Because of printing timetables, the principal deleted the two pages of the paper on which the articles appeared and the paper was printed as a four page paper instead of a six page paper. *Id.* at 264.

This Court conducted a forum analysis[3] to answer the question whether the school newspaper was a public forum for student speech. *Id.* at 267-70. After reviewing the control the school exercised over the forum and highlighting the curricular nature of the newspaper, this Court concluded that "School officials did not evince, either 'by policy or by practice,' any intent to open the pages of [the newspaper] to 'indiscriminate use,' by its student reporters and editors, or by the student body generally. Instead, they 'reserve[d] the forum for its intended purpos[e].'" *Hazelwood*, 484 U.S. at 270 (quoting *Perry Education Ass'n.*, 460 U.S. at 46- 47 (internal citations omitted)).

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[3] As the Court of Appeals pointed out in this case, this Court's forum analysis in *Hazelwood* followed its established precedent on forum analysis and free speech in *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983), and also in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). *See* App. 30a-31a.

The *Hazelwood* Court stated that educators are allowed to exercise greater control over student speech that occurs as part of the school curriculum that is supervised by faculty members and is designed to impart particular knowledge and skills to the student participants and audiences. *Id.* at 271. The control exercised over the student speech is designed to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* This Court then admonished that, "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression *has no valid educational purpose* that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." *Id.* at 273 (citations omitted) (emphasis added). This Court then held that the principal's actions in censoring the student articles was reasonable.

Nowhere in this Court's discussion of *Hazelwood* did it countenance viewpoint discrimination of student speech.[4] This Court carefully outlined the circumstances when the school was entitled to a lesser standard of scrutiny in its censorship of student speech. As long as the students "learn whatever lessons the activity is designed to teach," that those

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[4] In fact, as the Court of Appeals noted, the high school conceded that only viewpoint neutral access to the school newspaper would have passed constitutional muster. App. 30a (citing *Hazelwood*, 484 U.S. at 287 n.3 (Brennan, J., dissenting) ("Petitioners themselves concede that 'control over access' to Spectrum is permissible only if 'the distinctions drawn ... are viewpoint neutral.'") (internal citations omitted)).

reading or listening to the student speech "are not exposed to material that may be inappropriate for their level of maturity," and as long as "the views of the individual speaker are not erroneously attributed to the school," then the school is without power to censor the student speech. *Hazelwood*, 484 U.S. at 271.[5] It is in these circumstances that the school's censorship would have "no valid educational purpose" sufficient to justify the infringement of student speech. *Id.* at 273.

The Court of Appeals in the present case found it "significant that *Hazelwood* analyzed the nature of the expressive forum created by the high school newspaper at issue in the case, and relied, in that analysis, on its prior decision in *Cornelius [v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985)] and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)." App. 30a. The Court of Appeals noted that both *Perry* and *Cornelius* "stated that government speech regulations that discriminated among viewpoints were prohibited under the First Amendment. Yet *Hazelwood* never distinguished the powerful holdings of these cases with respect to viewpoint neutrality, or for that matter, even *mentioned*, explicitly, the question of viewpoint neutrality. And we are reluctant to conclude that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule *Cornelius* and *Perry* - even in the limited context of school-sponsored speech." App. 31a. The Court of Appeals thus declined to depart from what it described as "a core facet of First Amendment protection." *Id.*

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[5] Of course, the school could censor student speech if it "materially and substantially" disrupted the school environment. *See Tinker* 393 U.S. at 509.

The Eleventh Circuit Court of Appeals likewise found that *Hazelwood* did not establish the right of the school to engage in viewpoint discrimination. *See Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989). The *Searcy* court stated that *Hazelwood* "involved a content based distinction; the principal decided that the subject of teenage sexuality was inappropriate for some of the younger students. There was no indication that the principal was motivated by a disagreement with the views expressed in the articles." *Id.* at 1324-25 (internal citations omitted). The Eleventh Circuit concluded, "Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id* at 1325 (internal citations omitted).

Indeed, a fair reading of *Hazelwood* leads only to the conclusion that this Court did not allow for viewpoint discrimination against the student speech because the Court simply did not address the issue. It stretches *Hazelwood* beyond a fair reading of that case to say that this Court countenanced viewpoint discrimination against student speech when in fact this Court did not directly address the issue and cited with approval to established First Amendment precedent prohibiting viewpoint discrimination.

Petitioners attempt to blur the line between student speech and government speech by contending that "when teachers and students are engaged in a curricular activity, the speaker

is the school...." Pet. for Cert. at 24.[6] However, *Hazelwood* never establishes that student speech occurring in the curricular context somehow transforms to the government's speech. In fact, *Hazelwood* establishes the exact opposite - that student speech remains student speech even when it occurs in the curricular context. The *Hazelwood* Court was very clear in describing the student speech at issue. The Court stated, "The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker [v. Des Moines Independent School District*, 393 U.S. 503 (1969)] - is different from the question whether the First Amendment requires a school affirmatively to promote particular *student*

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[6] Petitioners make this argument to presumably bring themselves within this Court's statement that, "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). After making this statement, the Court cited as an example to *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) and *Hazelwood*, 484 U.S. 260, 270-72. Petitioners argue that this citation proves that this Court meant that any speech governed by *Hazelwood* was government speech. This a specious argument. The Court's citation is more plausibly interpreted as citing to those cases governing the prohibition on the government engaging in viewpoint discrimination of individuals *whose speech the government facilitates*. Indeed, such an interpretation is more consistent with *Hazelwood's* own statement that student speech in the curriculum context is *promoted* by the school - not that the student speech in some way is transformed into government speech simply because it occurs in the curriculum context. Petitioners read too much into *Rosenberger*.

speech." *Hazelwood*, 484 U.S. at 270-71 (emphasis added). Even though the level of constitutional scrutiny changed because of the nature of the forum where the speech was occurring and the characteristics of the school environment, the fact that the speech at issue was *student speech* did not change. Student speech does not transform into government speech simply because it occurs in a curriculum environment. Indeed, the speech at issue in this case was a poster drawn by a kindergarten student. No serious argument could be made that anyone viewing the poster in this case would believe it to be the government speaking. Everyone would see the poster for what it is - the work of a kindergarten student.[7]

Petitioners' argument also flies in the face of this Court's own statement regarding the nature of public schools. This Court was very clear that:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. ... In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. *They may not be confined to the expression of only those sentiments that are officially approved.* In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Tinker, 393 U.S. at 511 (emphasis added). This Court also

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[7] As Justice Alito stated in *Oliva*, "Things that students express in class or in assignments when called upon to express their own views do not 'bear the imprimatur of the school,' and do not represent 'the [school's] own speech." *Oliva*, 226 F.3d at 214 (Alito, J., dissenting).

stated, "The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Students are in public schools because they are mandated to be there. However, this Court has made it clear that while there, students may not be closed-circuit recipients of only what the state says and cannot constitutionally be required to express only those sentiments that are officially approved. Petitioners' argument that somehow student speech magically turns into government speech because it occurs in the curriculum context or is otherwise school-sponsored lacks any precedential support.

The Court of Appeals' decision in this case to follow *Hazelwood* and prohibit viewpoint discrimination in the public schools is fully consistent with this Court's decision in that case.

B. The Second Circuit's Decision Is In Harmony With This Court's Established Free Speech Precedent.

Not only is the Second Circuit's decision entirely consistent with this Court's decision in *Hazelwood*, it is also consistent with this Court's well-established free speech precedent regarding viewpoint discrimination. This Court has unambiguously held in numerous cases that the government is prohibited from censoring speech simply because it disagrees with the viewpoint the speech espouses.

In *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. The Lamb's Chapel Church sought to show a religious and educational film on the school premises and was denied under

the religious exclusion section of the policy. *Id.* at 386-87. This Court ruled that the film series dealt with an otherwise includable subject and that the exhibition was denied solely because the series dealt with the subject from a religious standpoint. *Id* at 393-94. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

In another case, the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). This Court found that the school engaged in viewpoint discrimination. *Id.* at 830. Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.*

> *It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.* Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Discrimination against speech because of its message is presumed to be unconstitutional.* These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not the subject matter, but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant. *Viewpoint discrimination is thus an egregious*

> *form of content discrimination.* The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 828-29 (citations omitted) (emphasis added). This Court recognized that, "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

Similarly, in *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001), a public school excluded a Christian organization from school facilities after hours. Recognizing that the public school permitted groups to use the same facilities for secular purposes, this Court held "that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination ...." *Id.* at 107.

The foundational cases of this Court's free speech doctrine are in accord in their distaste of viewpoint discrimination.

> Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose special benefit the forum was created . . . *the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.*

Cornelius, 473 U.S. at 806 (emphasis added).

"[T]he state may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to

suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n.,* 460 U.S. at 46.

Nowhere has this Court made an exception that the government may engage in viewpoint discrimination against private speech. The prohibition against viewpoint discrimination is absolute.[8] Therefore, the Second Circuit's decision in this case to prohibit viewpoint discrimination is entirely consistent with this Court's foundational free speech precedent. To allow viewpoint discrimination against private student speech, even if it occurs in the curricular context, flies in the face of this Court's absolute prohibition on viewpoint discrimination of private speech by the government.

Because the Second Circuit's opinion is consistent with this Court's decision in *Hazelwood* and also this Court's free speech precedent, this case makes a poor vehicle for review. Therefore, the requested writ should be denied.

II.

IF THIS COURT GRANTS THE WRIT OF CERTIORARI, IT SHOULD ALSO CONSIDER THE UNRESOLVED ISSUE WHETHER THE ESTABLISHMENT CLAUSE IS A VALID COMPELLING INTEREST JUSTIFYING A VIEWPOINT-BASED DISCRIMINATION ON

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[8] The only area where the government is allowed to make viewpoint distinctions is when it is speaking itself. *See Rosenberger*, 515 U.S at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). However, this Court has never allowed the government to engage in viewpoint discrimination against any kind of private speech.

SPEECH.

Should this Court grant the requested Writ of Certiorari, it should also consider the interrelated and subsidiary issue whether the Establishment Clause is a valid compelling interest sufficient to justify a viewpoint-based restriction on speech. The Second Circuit in this case stated:

> In remanding the free speech claim to the district court for further consideration of the viewpoint neutrality issue, however, we do not *foreclose* the possibility that certain aspects of the record might be developed in such a manner as to disclose a state interest so overriding as to justify, under the First Amendment, The District's potentially viewpoint discriminatory censorship. For example, The District has proffered its interest in avoiding the perception of religious *endorsement* as a rationale for not including Antonio's full poster in the environmental assembly. We cannot say, at this time, as a matter of law that The District's concern in this regard would justify viewpoint discrimination.

App. 32a. Therefore, the Second Circuit left open the possibility that the Petitioners could potentially raise a valid Establishment Clause defense to their viewpoint discrimination of Antonio's poster.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court noted that an interest on the part of the government in avoiding an Establishment Clause violation may be a compelling interest justifying *content-based* discrimination against speech. *Id.* at 271. However, this Court went on to hold that the governmental interest was not "sufficiently compelling" to justify content-based discrimination against the religious speech at issue. *Id.* at 278.

"This Court suggested in *Widmar v. Vincent*, 454 U.S. 263, 271(1981), that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment...." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (parallel citations omitted). However, this Court concluded, "We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded." *Id.*

In *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), this Court continued its discussion regarding the proper role the Establishment Clause may play as a compelling interest to justify a restriction on speech. "We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest." *Id* at 112-13 (internal citations omitted).

Therefore, while acknowledging that the issue whether the Establishment Clause may present a compelling interest sufficient to justify viewpoint restrictions on speech, this Court has never directly confronted that issue because it has never found a valid Establishment Clause concern.[9]

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[9] Respondent believes that the reason for this lack of direct confrontation relates to the fact that private speech cannot violate the Establishment Clause. Therefore, when private speech is at issue, as it will be when viewpoint discrimination occurs, there will

Lower courts have likewise acknowledged the uncertainty surrounding this question and in fact have come to conflicting results on the issue. The Ninth Circuit holds that the Establishment Clause provides a compelling interest sufficient to justify viewpoint discrimination. *See Hills v. Scottsdale Unified Sch. Dist. No. 408*, 329 F.3d 1044, 1053 n.7 (9th Cir. 2003) (stating, "The Supreme Court observes in *Good News Club* that the question 'whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination' is an open one. ... [T]he question is not open in this Court, as we have upheld exclusions of religious speech in public fora.") (citing *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir. 2003) (holding that censorship of religious speech at graduation ceremony was required to avoid establishment Clause violation)); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103-05 (9th Cir. 2000) (same). The Fourth and Eighth Circuits have assumed without deciding that the Establishment Clause may constitute a compelling interest to avoid an Establishment Clause violation. *See Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Cty.*, 373 F.3d 589, 595 (4th Cir. 2005) (assuming that a violation of the Establishment Clause constitutes a governmental interest compelling enough to overcome viewpoint discrimination but finding no Establishment Clause violation); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1507-08 (8th Cir. 1994) (holding that viewpoint discrimination can constitute a compelling governmental interest sufficient to justify viewpoint discrimination but finding no Establishment Clause violation)

In contrast, the Third and Tenth Circuits have

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generally be no valid Establishment Clause concern.

acknowledged the uncertainty in this area, but have not decided one way or the other. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township*, 386 F.3d 514, 530 (3d Cir. 2004) (stating, "The Supreme Court has not settled the question whether a concern about a possible Establishment Clause violation can justify viewpoint discrimination. But we need not decide this issue here, because giving Child Evangelism equal access to the fora at issue would not violate the Establishment Clause." (internal citations omitted)); *Summum v. City of Ogden*, 297 F.3d 995, 1009 (10th Cir. 2002) (noting that, "The Supreme Court has yet to resolve whether a municipality's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination.").

There is uncertainty and conflict among the lower courts on the issue whether the Establishment Clause justifies a viewpoint-based restriction on speech. This Court has acknowledged the uncertainty surrounding this question, but has never directly addressed the issue. This Court, if it accepts this case, should take the opportunity to declare that the Establishment Clause is not a compelling interest to justify viewpoint discrimination of private student speech that happens to occur in the curricular context as under the circumstances of this case. This case presents this issue directly. The record is complete on this issue because discovery has concluded and this case was decided on summary judgment. Therefore, should this Court grant the requested writ, it should also include the interrelated and subsidiary issue[10] whether the Establishment Clause justifies

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[10] *See* Supreme Court Rule 14.1 (a) "The statement of any question presented is deemed to comprise every subsidiary issue fairly included therein."

viewpoint-based censorship of private student speech.

CONCLUSION

While Respondent acknowledges that the Circuit Courts are split on the issue whether viewpoint discrimination is permissible under this Court's opinion in *Hazelwood*, based on the foregoing, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari because the Second Circuit's opinion is entirely consistent with *Hazelwood* and this Court's established free speech precedent. In the alternative, Respondent requests that if this Court does grant the Petition, that it also consider the interrelated and subsidiary issue whether the Establishment Clause of the First Amendment to the United States Constitution is a sufficiently compelling governmental interest to justify viewpoint discrimination.

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Appendix